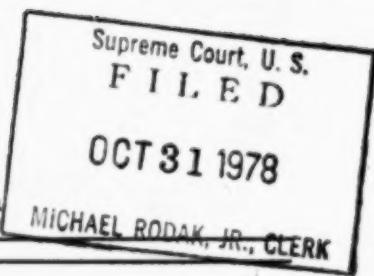


APPENDIX
Volume I
Pages 1a to 554a



IN THE
Supreme Court of the United States
OCTOBER TERM, 1977
No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977
CERTIORARI GRANTED MARCH 20, 1978

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Chronological List of Relevant Docket Entries

- Oct. 8, 1971 —Federal Trade Commission Complaint issued.
- Nov. 15, 1971 —Answer of Respondent The Great Atlantic & Pacific Tea Company, Inc. filed.
- Feb. 9-10, 1972 —Deposition of Joseph Malone.
- June 11, 1973 —Hearing commenced.
- Nov. 2, 1973 —FTC concluded case in chief.
- Mar. 11, 1974 —Respondents commenced case in chief.
- July 31, 1974 —Respondents concluded case in chief.
- Sept. 23, 1974 —FTC commenced rebuttal case.
- Oct. 1, 1974 —FTC concluded rebuttal case.
- Dec. 19, 1974 —A&P commenced surrebuttal case.
- Dec. 20, 1974 —A&P concluded surrebuttal case.
- Mar. 27, 1975 —Hearing concluded.
- Sept. 24, 1975 —Initial Decision and Order of Administrative Law Judge.
- Apr. 29, 1976 —Final Order and Opinion of FTC.
- June 21, 1977 —Opinion and Judgment of the Court of Appeals for the Second Circuit.
- Aug. 8, 1977 —Court of Appeals' denial of petition for rehearing or rehearing in banc.
- Mar. 20, 1978 —Grant of petition for writ of certiorari.

Complaint

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
DOCKET No. 8866

In the Matter of
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
a corporation, and
BORDEN, INC., a corporation.

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. Section 13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York 10017.

Complaint

PARAGRAPH Two: Respondent A & P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 states of the United States, the District of Columbia and in Canada. Respondent A & P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over \$5,436,325,000.00 and for the fiscal year ended February 28, 1970, they totalled \$5,753,692,000.00.

Included among A & P's retail grocery chain stores are approximately 260 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A & P. This Division was formerly identified as the Chicago Unit of A & P's Middle Western Division.

PARAGRAPH THREE: In the course and conduct of its business, respondent A & P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A & P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A & P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

Complaint

The aforesaid sellers are located in the various states of the United States, and respondent A & P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A & P's retail stores and warehouses located in the same state and various other states of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A & P.

PARAGRAPH FOUR: Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York 10017.

PARAGRAPH FIVE: Respondent Borden is a holding and operating company having on December 31, 1969, a 100% voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

Complaint

Borden's net sales amounted to approximately \$1,740,184,687.00 in 1969 and approximately \$1,827,341,000.00 in 1970.

PARAGRAPH SIX: Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the states of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PARAGRAPH SEVEN: In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other states of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH EIGHT: Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-pur-

Complaint

chasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PARAGRAPH NINE: In the course and conduct of its business in commerce, respondent A & P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A & P's own private label, to the majority of the stores of A & P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A & P or peculiar to the retail operations of A & P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PARAGRAPH TEN: The foregoing act and practice of respondent A & P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45.)

*Complaint**Count II*

PARAGRAPH ELEVEN: Paragraphs One Through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: In the course and conduct of its business in commerce, respondent A & P has knowingly induced or received discriminations in price which **are prohibited** by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A & P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A & P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A & P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PARAGRAPH THIRTEEN: When respondent A & P knowingly induced or received the discriminatory prices from its supplier, as alleged, A & P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH FOURTEEN: The aforesgoing acts and practices of A & P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

*Complaint**Count III*

PARAGRAPH FIFTEEN: Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH SIXTEEN: During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A & P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A & P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

Complaint

PARAGRAPH SEVENTEEN: The aforesgoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45.)

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 8th day of October, A.D., 1971, issues its complaint against respondent.

**Answer of Respondent The Great
Atlantic & Pacific Tea Company, Inc.**

[Caption Omitted in Printing]

Respondent, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), by its attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, for its answer to the complaint alleges as follows:

1. Admits the allegations of PARAGRAPH ONE and PARAGRAPH Two except alleges that A&P presently operates 4,329 stores in 36 States of the United States, the District of Columbia and Canada, 236 of which stores comprise A&P's Chicago Division.
2. In answer to PARAGRAPH THREE: With respect to the first paragraph thereof, admits that in the course and conduct of certain aspects of its business A&P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act, but denies the other allegations of such paragraph. With respect to the second unnumbered paragraph thereof, admits that A&P is and has been in active competition with other corporations, partnerships, firms and individuals engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, that some of such products are of like grade and quality and that some of such products are purchased from the same or competitive sellers, but denies the other allegations of such paragraph. With respect to the third unnumbered paragraph thereof, admits that A&P purchases grocery and household products from sellers located in various States of the United States, that before or after purchase by A&P such products may be transported from the place of processing or manufacture to A&P's retail stores or warehouses, some of which are located in the State in which

A&P Answer

products purchased by A&P are processed or manufactured and some of which are not, admits the allegations of the second sentence of such paragraph, but denies the other allegations of such paragraph.

3. In answer to PARAGRAPH FOUR, admits upon information and belief that Borden is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York.

4. Denies having information sufficient to form a belief as to the correctness of the allegations of PARAGRAPH FIVE, PARAGRAPH SIX and PARAGRAPH SEVEN.

5. Upon information and belief, admits the allegations of PARAGRAPH EIGHT.

6. In answer to PARAGRAPH NINE, admits that A&P, beginning in November, 1965, has purchased from Borden milk and other dairy products, packaged under A&P's own private label, for resale in a majority of the stores of A&P's Chicago Division, admits the second unnumbered paragraph of such paragraph, but denies the other allegations of PARAGRAPH NINE.

7. Denies the allegations of PARAGRAPH TEN.

8. In answer to PARAGRAPH ELEVEN, realleges paragraphs 1 through 7 hereof.

9. Denies each and every allegation of PARAGRAPH TWELVE, PARAGRAPH THIRTEEN and PARAGRAPH FOURTEEN.

10. In answer to PARAGRAPH FIFTEEN, realleges paragraphs 1 through 9 hereof.

A&P Answer

11. Denies each and every allegation of PARAGRAPH SIXTEEN and PARAGRAPH SEVENTEEN.

AFFIRMATIVE DEFENSES

12. Count I of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

13. Count II of the complaint fails to state a violation of subsection (f) of Section 2 of the Clayton Act, as amended (15 U.S.C. § 13(f)).

14. Count III of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

15. Upon information and belief, any differential between any price charged by Borden to any competitor of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

16. In purchasing milk and other dairy products from Borden, A&P acted in good faith reliance upon Borden's representation and warranty that the prices for such milk and other dairy products were lawful prices.

17. In purchasing milk and other dairy products from Borden, A&P acted in good faith belief that any differential between any price charged by Borden to any competitor of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

A&P Answer

18. At the time it received private label price quotations from Borden in the fall of 1965, A&P believed in good faith that other grocery chains in the Chicago Metropolitan Area which are major competitors of A&P were buying milk and dairy products, including private label milk and dairy products, at prices as low as or lower than the prices then being quoted to A&P by Borden.

19. Borden did not disclose to A&P in any manner reasonably calculated to inform A&P that it was Borden's position that the only justification for the prices for private label milk and other dairy products sold by Borden to A&P was "meeting competition."

20. At no time did A&P, or any of its officers, employees or agents, mislead or misinform Borden or make any misstatement to Borden with respect to the existence or the nature of price quotations for milk and other dairy products made to A&P by competitors of Borden.

Dated: New York, New York
November 15, 1971

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL
& OHL

By /s/ DENIS MCINERNEY
Denis McInerney

By /s/ MARSHALL H. COX, JR.
Marshall H. Cox, Jr.

Attorneys for Respondent
The Great Atlantic & Pacific
Tea Company, Inc.
80 Pine Street
New York, New York 10005
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Application of Respondent The Great Atlantic & Pacific Tea Company, Inc. for Issuance of Subpoena Duces Tecum and for Vacation or Modification of Order

[Caption Omitted in Printing]

Respondent The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby applies,

- (i) Pursuant to Rules 3.34 and 3.36 of the Commission's Rules of Practice and the Freedom of Information Act, 5 U.S.C. § 552, for issuance of a subpoena duces tecum directed to Charles A. Tobin, Secretary, Federal Trade Commission, Washington, D.C., requiring him to appear before Hearing Examiner Schrup at a prehearing conference, at a time and place designated by the Hearing Examiner, for the purpose of producing for inspection and copying certain documents in his possession, custody or control; and
- (ii) Pursuant to Rules 3.22 and 3.33(d) of the Commission's Rules of Practice for an order either vacating the order of the Hearing Examiner dated November 8, 1971 authorizing counsel supporting the complaint to take the depositions of Ralph R. Minkler, Gordon Tarr and Joseph Malone beginning December 1, 1971 in Chicago, Illinois, or modifying the order dated November 8, 1971 to reschedule the depositions of such individuals to commence one week after the return date fixed by the Hearing Examiner for the subpoena duces tecum requested in (i) above.

The documents which A&P seeks to have produced for inspection and copying are the following:

1. All transcripts of testimony, statements and affidavits of officers, employees or representatives of respondent Borden, Inc. ("Borden") or former officers,

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employees or representatives of Borden (including without limitation Ralph R. Minkler, Gordon Tarr and Joseph Malone), and all documents containing statements by and all reports and memoranda of interviews or conferences with such officers, employees or representatives or former officers, employees or representatives of Borden (including without limitation Ralph R. Minkler, Gordon Tarr and Joseph Malone) relating in any way to the subject matter of the complaint herein;

2. All documents referred to or described in any of the foregoing transcripts, statements, affidavits, reports and memoranda;

3. All documents obtained in conjunction with Commission Investigation No. 671 0149 which refer or relate to contracts, proposals, negotiations, costs, cost savings, possible cost savings, meeting competition, prices, terms of trade or delivery terms for the supply or sale of milk or other dairy products (including private label milk and other dairy products) in the States of Illinois, Indiana or Iowa;

4. All documents obtained in conjunction with Commission Investigation No. 671 0149 which contain or refer to any market share figures, results of any market analysis, survey, study, statement or comment as to the market share or market position of any seller or buyer of milk or other dairy products in all or any part of the geographic area referred to in the complaint as having been served by A&P's Chicago Division (formerly Chicago Unit);

5. All documents which show for any time, between January 1, 1964 and October 14, 1971, the actual, offered or proposed prices or terms of sale or delivery of

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milk or other dairy products to stores in A&P's Chicago Division (formerly Chicago Unit) or any competitor of such stores;

6. All documents which indicate, support or would tend to establish that any lower price charged by Borden to A&P, as alleged in the complaint herein, was made to meet the prices of a competitor of Borden; and

7. All documents which contain any evidence favorable to A&P herein, including any evidence which might weaken or overcome testimony adverse to A&P likely to be given by any witness or witnesses intended to be called by counsel supporting the complaint or any evidence which might otherwise be construed to be directly or indirectly exculpatory of any act or conduct alleged in the complaint to have been committed or engaged in by A&P.

The term "documents" is used in a comprehensive sense and includes without limitation letters, reports, memoranda, minutes, bulletins, circulars, notes, electronic recordings, charts, drawings, drafts, worksheets, advertisements, and other writings or printed matter of any nature including copies of any kind of any of such items. If any requested documents are deemed privileged or confidential, pursuant to Rule 4.10 or otherwise, each such document and the specific parts deemed privileged, confidential or otherwise not subject to discovery shall be identified, and the grounds on which the claim of privilege or confidentiality rests shall be separately stated as to each.

In support of its application for a subpoena duces tecum requiring the production of the above-described documents, and in support of its application that either the Hearing Examiner's order of November 8, 1971 be vacated or the

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scheduled depositions be deferred pending completion of documentary discovery requested by this application, A&P asserts as follows with respect to the general relevancy of the material requested, the reasonableness of the scope of the subpoena and the need for vacating the order or deferring the requested depositions:

It is plain that the Hearing Examiner's order granting the application to take depositions by counsel supporting the complaint effectively amounts to an order that the hearing on the merits in this proceeding will commence with the depositions of these three witnesses. The purpose of these depositions is not to seek discovery, as counsel for the complaint have already had full discovery of A&P and Borden in protracted investigatory proceedings that have extended over several years. The stated purpose of these depositions is to preserve the testimony of three individuals—Ralph R. Minkler, Gordon Tarr and Joseph Malone—who, from what counsel supporting the complaint have said in their *ex parte* application for an order authorizing the depositions, are obviously the key witnesses upon whose testimony the case in support of the complaint will chiefly depend. Counsel supporting the complaint have requested that the Hearing Examiner be present at the taking of these depositions, and he has agreed to do so, because "it is expected the question of credibility among witnesses for the parties may arise and become important at the trial." The subject matters that counsel supporting the complaint expect these witnesses to testify about are described in detail in the Hearing Examiner's November 8, 1971 order in a statement that confirms in all respects A&P's understanding that, for all practical purposes, the testimony of these witnesses is the crux of the case in support of the complaint.

To require A&P to proceed to examine these three witnesses, who are expected to establish the case against it,

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without first according A&P any opportunity whatever to prepare such an examination on the basis of full and adequate discovery would reduce this proceeding to a travesty.

Under the Commission's Rules and the Administrative Procedure Act, as amended, a litigant before this Commission is entitled to discovery of materials in the possession of the Commission or its staff which are likely to bear upon any aspect of the subject matter of the complaint about which witnesses offered by counsel supporting the complaint might be expected to testify. Since a primary basis for the order granted by the Hearing Examiner is the likelihood that these witnesses will testify only upon deposition—and not at an evidentiary hearing in ordinary course—discovery before the depositions commence is essential if A&P is to be accorded its right to conduct meaningful cross-examination.

The documents that A&P seek from the Commission are all directly related to the subject matter of the testimony that counsel supporting the complaint have indicated will be given by the three witnesses in question. A&P is entitled under the Commission's Rules and applicable provisions of law to significantly wider discovery than asked in the present application, and it is hereby expressly reserving its right hereafter to apply for the additional, broader discovery to which the law entitles it. Nonetheless, and in order that this proceeding may go forward promptly, we have elected to limit the instant application to the bare minimum of essential documents without which A&P cannot be reasonably required to go forward with the cross-examination of what are expected to be critically important witnesses.

WHEREFORE, we respectfully request that the Hearing Examiner grant this application and enter an order issuing the subpoena duces tecum requested by A&P and vacating

A&P Application

or modifying the order of November 8, 1971 as requested.

In view of the importance of this application to all further proceedings in this matter, A&P respectfully requests that oral argument be heard upon this application.

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL & OHL

By /s/ DENIS McINERNEY
Denis McInerney

By /s/ MARSHALL H. COX, JR.
Marshall H. Cox, Jr.

Attorneys for Respondent

*The Great Atlantic & Pacific Tea
Company, Inc.*

80 Pine Street
New York, New York 10005
(212) WHitehall 4-7400

Dated: New York, New York
November 15, 1971

Testimony of Joseph Malone

February 9-10, 1973

* * * * *

【11】 * * *

Q. Did you advise your superiors, the president of the district, concerning cost accounting procedure problems as well as other types of problems the district might run into, sir? A. In the general application of responsibilities, I would say that I counseled with him. I did not advise.

Q. And you counseled with him concerning cost accounting problems? A. I counseled with him in regard to anything which I thought was necessary of counseling, whatever that might embrace.

Q. In the course of your employment with the Central District and the Chicago milk operation, your duties at one time or other did include the cost accounting procedures of the district, did they not, sir? A. I would say so.

Q. What is your educational background in the accounting field, sir? A. I attended Pace, which today is Pace Institute in New York City, and I took accounting there.

Q. Did you receive a degree in accounting? A. No, sir.

Hearing Examiner Schrup: How much time did you spend at Pace as a student?

【12】 The Witness: I think it was almost three years, sir, if a recollect correctly. It was a long time ago.

But for the record I would say that intermittently I took additional courses at various universities from time to time.

Hearing Examiner Schrup: Will you name them, please?

The Witness: I attended College of New York, at the Thompson Harris Section, and I also took some courses at Columbia University. These are accounting and economic courses.

Testimony of Joseph Malone

By Mr. Mathias:

Q. Did you have any other professional qualifications that you have not mentioned, sir, as an accountant or cost accountant? A. No, I don't understand what you mean by professional qualifications.

Q. Have you received any professional recognition from accounting groups? A. Not from accounting groups.

Q. From any type of association or group? A. I think in that regard I was Chairman of the Accounting Advisory Board of the old International Dairy Association, and I was also appointed to a study group by the State of Wisconsin in connection with their State Fair Trade Practices Act.

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【15】 * * *

Q. Prior to your appointment as vice president of governmental controls, had you in any of your positions with Borden conducted cost studies into Borden's distribution to various customers within the Central District, or the Chicago Milk District? A. Yes.

Q. Do you recall how many of such studies you had conducted? A. You mean formal time and motion studies?

Q. Yes, formal cost studies. A. Formal time and motion studies?

Q. Yes, sir. A. We had in two instances formal time and motion studies under way.

Q. Could you tell us the occasion of the first instance, sir? A. One was in Chicago, and we had a matter which required a cost justification finding, and we made a complete time and motion study of the market.

【16】 Q. What was that matter, sir? What was the matter that required the preparation? A. I don't recall exactly what the issue was, but it was a matter between U.S. of America versus Borden.

Testimony of Joseph Malone

Q. And do you recall the approximate date of this time study? A. No, sir.

Q. Was it during the 1950s, sir? A. It could be in that period. It is pretty far back.

Q. Do you recall whether or not that involved a possible justification for differences in price between sales to chain stores as compared to independent stores? A. I think that was one of the issues.

Q. Do you recall the chain stores that were involved, sir? A. At that time the company served two particular ones, which are Jewel Tea Company at that time, and the Great Atlantic and Pacific Tea Company.

Q. Sir, in the course of preparing this cost study, the one dealing with this particular matter involving Jewel and the Great Atlantic and Pacific Tea Company, were you called as an expert witness in those proceedings? A. I think I was.

Q. What other cost study involving a time and motion study did you conduct for the Borden Company? A. We had one matter in the State of Wisconsin.

【17】 Q. Was that prior to or later than the U. S. versus Borden study? A. Subsequent to.

Q. Do you recall the approximate time when that study was conducted? A. No, sir.

Q. Was that related to any particular incident or complaint against the Borden Company? A. There was no complaint issued, sir.

Q. Was there any particular incident that required this cost study, or was this a general inquiry by the State of Wisconsin? A. I would take it that it was a general inquiry by the State of Wisconsin.

Q. To your knowledge, were other companies required to make cost studies at this time? A. I would not know, sir.

Testimony of Joseph Malone

Hearing Examiner Schrup: These cost studies in this Wisconsin situation, did they involve the sale and distribution of milk?

The Witness: Yes.

By Mr. Mathias:

Q. I don't think we covered this. In U. S. versus Borden, the cost study involved the sale and distribution of milk, also, did it not, sir? 【18】 A. Yes, sir.

Q. In connection with the Wisconsin study, did you have to appear in any formal proceeding? A. No, sir.

Q. Was there any informal proceeding by the State of Wisconsin? A. Just a discussion in respect to the procedure that we would follow in arriving at the data which was necessary to support the issue.

Q. Did they accept the procedure which Borden followed in conducting the cost studies? A. Yes, sir.

Q. Would you describe in general the background of the cost study, the manner in which the cost study was prepared in Wisconsin? A. It was formalized into a method and procedure to be followed at every level of distribution and individuals were assigned to develop the data, the time, and the facts involved at each level. They rode the routes, they listed the information, they made records of the volume, and made record of the time, as I indicated, of every functional activity which was involved.

Q. Can you tell me what action or inquiry on the part of the State of Wisconsin prompted this study? A. It was a matter of selling prices to the Kroger Company.

【19】 Q. And did the cost study then involve again the justification of lower prices, of prices to a chain as compared to prices to various independent store units? A. No, I don't think it involved that. It involved the pricing policies in the State of Wisconsin as related to the Wisconsin Dairy Trade Practices Act.

Testimony of Joseph Malone

Q. Did the Wisconsin study involve a study of different methods of delivery? A. It involved the type of delivery that was in effect in the State of Wisconsin by Borden.

Q. Do you recall what the types of delivery you had in effect at that point? A. No, sir.

Q. Do you know whether it involved dropped delivery, that is, dropping off the product at the store without servicing the cases inside? A. I think within the State of Wisconsin you would find that the type of delivery was geared to the particular area that was involved. It could embrace all types of distribution.

Q. So that your study would involve a broad variety of distribution services. Is that right, sir? A. Yes, sir. In other words, the study covered completely Borden's activities and distribution of milk in the State of Wisconsin.

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【43】 * * *

The Witness: No, we are not talking about A&P. We are talking about sales of private label milk versus advertised brands. . .

By Mr. Mathias:

Q. So this was a price differential Borden had used in some other area. Is that correct? A. Yes, sir.

Q. By a half cent per point, what is meant in the dairy industry by the term "point"? A. The point is equivalent to a quart of milk. That is the yardstick.

Q. So that all dairy units are divided up as quart equivalents? A. Not quart equivalents. The factor is generally related to points. Points are involved in union contracts and union contracts generally spell out what a point represents, and this is generally the basic quantitative measurement that has been used consistently in the industry.

Q. How many points would be in a half gallon? A. Two

Q. And a gallon would be four? A. That is right, sir.

Testimony of Joseph Malone

Q. And these are applied also to the various by-products such as cottage cheese. Is that correct? **[44]** A. Yes, sir.

Q. How, generally, are they related to the quart? A. A package of cottage cheese would be one point.

Q. Is this based on size, bulk, price, or what? A. No, a one pound container would be one point.

Q. So it is basically a size or weight equivalent? A. Not weight. Generally the size of the package.

Q. All right, sir.

Now, Mr. Malone, I show you Commission Exhibit 8-A through C for Identification. This is the December proposal.

It would appear in comparing it with the November proposal that there has been an increase of one cent per half gallon on the differential between the private label and Borden label.

I take it that this would be an increase from a half cent per point differential to a full cent per point differential. Is that correct? A. That is what the schedule shows, sir.

Q. Did you participate in the decision to change the differential being offered from a half cent per point to a cent per point? A. I think there was general discussion.

Q. Do you recall who was involved in these discussions, sir? A. No, sir.

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[51] * * *

Q. This does not outline all of the restrictions on your delivery program under your Chicago union contracts, does it, sir? A. No, sir. This is talking about, or rather, this is indicating that the prices that are quoted here to A&P, or proposed to A&P, are subject to these conditions.

Q. Yes, sir. But, now, there may have been other restrictions on your delivery program under your Chicago union contracts which did not exist in other market areas which would not be apparent from the reading of these four items. Is that not correct, sir? A. That could be true.

Testimony of Joseph Malone

Q. Sir, referring again to Commission Exhibit 8-A, and the four numbered items at the bottom of the page, under heading, "Delivery shall be as follows," how did this compare with your normal delivery programs in Chicago at that time? A. Taking items 2, 3, and .4, normally the route driver would make delivery to the refrigerator case and put the product in and rotate the product. If a customer required a special delivery, a special delivery would have been made. And if the product became outdated, it would be returned and replaced.

【52】 Q. Were the modifications as set forth here on Commission Exhibit 8-A, was this delivery program allowable under your union contract at that time, sir? A. Yes, sir.

Q. Do you know whether or not this type of delivery program was in effect in sales to any of your customers in the Chicago area at that time? A. The general program that was in effect, this is what I have just previously outlined to you.

Q. That would be to rotate the product in the case? A. Yes, plus special delivery function and plus the refrigerator case delivery.

Q. Was it possible that some customers in the Chicago area were getting this modified type of service at this time? A. No, sir.

Q. Sir, do you recall whether in the succeeding months, the rest of 1965 and up into 1966, there was any change in this union requirement of six-day delivery? A. I don't recall any.

Q. Mr. Malone, I hand you Commission Exhibit 12-A and B for Identification, and ask you to familiarize yourself with this document, sir.

Mr. Malone, I also hand you Commission Exhibit 14-A through E, and request you to familiarize yourself with these documents.

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Testimony of Joseph Malone

【77】 What would be a contract hauler? What type of delivery would this be, sir? A. This would be an independent contractor. In other words, an individual who was in business for himself hauling product.

Q. So that in, for instance, the Lockport-Joliet area, which is the first one in the list in area No. 1, there the Borden deliveries would be made through a contractual hauler rather than your own routes? A. That is right. One thing I would like to point out, while we say data re A&P delivery cost, that is purely an identification. This does not mean that this is the delivery cost to an A&P. It is just to tie it in with the subject, that is all. The delivery cost and the type that we have here would be the cost of delivering at wholesale in these particular areas.

Q. These would be your estimate of deliveries? A. These would be estimates. We had no factual data. They are broad estimates at their best. It is an attempt to relate, based upon the good judgment of the person who developed it to what might be the average delivery cost.

Q. Then in the Woodstock area which is the next area listed, you have route, Local 301. A. That is right.

Q. What would this designation mean? A. That would be a company route operating under the profi— provisions of the union contract with Local 301.

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【102】 * * *

Q. Referring on this same page of Commission Exhibit 19-F, to the second full paragraph, the last sentence reads, "Product items were priced generally not in relation to cost but in relation to other competitors and in many cases to a cost appraisal which only recognized out-of-pocket elements of cost."

What did you mean by this, Mr. Malone? A. We were mainly referring to smaller markets in which the competi-

Testimony of Joseph Malone

tion is small dealers. In the smaller markets we were indicating to Mr. Schmidt that price factors sometimes are not related actually to cost because they don't know their cost and they keep no cost records and they jump all around.

Q. Now in the larger market areas such as Chicago, was your price computed in relation to your cost, or was there some competitive element in setting your prices in that market? A. I think in all major markets as well as in secondary markets there is always the matter of competition.

Q. Which was more important in setting your prices in these markets, the competitive price level or your cost? A. I don't understand the question.

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【122】 * * *

Q. Can you identify these documents, sir? A. As I indicated before, I can identify the summary sheet.

Q. That is Commission Exhibit 38? A. That is right.

Q. Do you recall having seen Commission Exhibit 39 previously that is "Cost differentials A&P vs. Borden label by items." A. I don't recall it specifically but I assume I must have seen it to prepare this.

Q. You did prepare Commission Exhibit 38? A. The summary only.

Q. That would have been based on a document similar to Commission Exhibit 39, is that correct, sir? A. No, only in total is it similar. This is entirely different.

Q. The total savings shown in each document? A. That is right.

Q. Now, Mr. Malone, I hand you Commission Exhibit 42-A through -E for identification and I ask you to familiarize yourself with this document. A. Yes.

Testimony of Joseph Malone

Q. Referring to Commission Exhibits 42-A through -D, leaving out the handwritten memo from the desk of J. B. Pentz, the last page, are you familiar with this document, sir? A. I am familiar with A through D, inclusive. I am not **[123]** familiar with E.

Q. What part, if any, did you play in the preparation of Commission Exhibit 42-A through -D? A. As I recall, I prepared it, sir.

Q. Why was this document prepared? A. I wanted to acquaint and inform management as to what would be the economic result if we lost A&P business.

Q. Why were you concerned with that question at this time? A. It is always a possibility, sir.

Q. I note a date appearing on Commission Exhibits 42-B through -D of 8/16/65. This would have been subsequent to your revised offer, proposal, to A&P of August 13. Was there any indication at this time that you might lose the A&P business? A. Not to my knowledge.

Q. For whom was this document prepared? A. I prepared it basically as informative data. I was not requested by anybody. It was just my own undertaking.

Q. Was it prepared on August 16 as indicated by the second, third, and fourth pages? A. I don't recall, sir.

Q. Whose handwriting appears at the bottom right-hand corner of Commission Exhibit 42-A? A. I don't know, sir. It is not mine.

Q. What period of the year, approximately, would the 6th period have included?

* * * * *

[149] Mr. Mathias: After my question has been answered.

Hearing Examiner Schrup: The question has been answered.

Testimony of Joseph Malone

Mr. Mathias: He did say yes?

Voir Dire Examination by Mr. McInerney:

Q. Are these actually costs to A&P or are these estimates? A. As I started to explain to His Honor, I have indicated previously in regard to every cost schedule that these costs are estimated costs. They are not actual costs obtained from any cost accounting element that the company has.

Hearing Examiner Schrup: How did you come to these estimated costs, so-called? What was your basis for putting those down on this paper?

The Witness: I had review elements of cost that pertained to various functions of our business. Naturally, Your Honor, over a period of time you develop a rapport as to what you believe as a matter of judgment. It is a matter of judgment of the cost accountant.

By Mr. McInerney:

Q. Were they directed specifically to A&P, these estimates or were they general estimates of cost in general? A. These are general estimates of cost which would relate to the functions that were involved.

Q. So, where it says credit and collection expense, for example, the credit and collection and expense there referred **【150】** to might be much less in the case of A&P than it would be with respect to other wholesale customers that you had? A. That is right. We never had the situation where A&P never paid its bill.

Q. Therefore, is it fair to say that these cost elements do not relate to A&P? A. As I said, sir, they are based upon the functional activity of distribution of milk at wholesale.

Testimony of Joseph Malone

Hearing Examiner Schrup: I think I understand the witness's answer.

Direct Examination by Mr. Mathias (continued):

Q. Sir, was there any attempt in making these various computations in dealing with pricing and costs to A&P to tie in the then current sales volume to A&P on the Borden label; in other words, in order to reach an estimate as to what the volume might be under the private label arrangement? A. I just don't understand the question. Just make it more condensed and I might understand it.

Q. In your various computations dealing with the A&P proposal, did you consider or did you project the volume that might be involved in your sales to A&P? A. We had basic records which showed the volume of business that we were doing with A&P.

* * * * *

【159】 Q. In the case of Mr. Tarr, would any of his duties in contacting A&P be included in the direct expense on this document? A. No, sir.

Q. Are you familiar with advertising programs conducted by the central division during this period of time, sir, during 1965? A. I don't know what you mean by "familiar".

Q. Do you know what types of advertising programs they had? A. I do not recall.

Q. Now, referring, Mr. Malone, to Commission Exhibit 55, that is, the handwritten memorandum, why was this document written? A. I think I explained previously a number of times that is my practice, to keep a record of every facet that took place in connection with the project.

Q. Now, in connection with Commission Exhibit 54, that is, your computation, was this document prepared for internal guidance purposes? A. Yes, sir.

Testimony of Joseph Malone

Q. Was it shown to A&P? A. I would not know.

Q. As you prepared it, was it intended to be shown to A&P? A. I prepared it, as I indicated to you, sir, for internal purposes, for informative information to management.

* * * * *

【171】 * * *

A. This was a report.

This memorandum of mine is a report that was made at the meeting as it was reported by Mr. Minkler.

Q. That is Commission Exhibit 63, sir? A. Yes, sir.

Q. Now, what I am asking you, sir, is: Do you have any present recollection of a discussion with Mr. Minkler concerning a letter to A&P concerning the availability of price to competitors? A. It might have been generally reviewed but that was outside of my concept of responsibility.

Q. Referring to Commission Exhibit 68, did you participate in writing that letter, sir? A. No, sir.

Q. Have you seen it before, sir? A. Yes, sir.

Q. Did you participate in discussions which led up to its preparation, sir? A. I can't recall. I can't recall the temper of the occasion at all.

Hearing Examiner Schrup: What does it mean in your memorandum of September 22, 1965, which is Commission Exhibit for identification 63-C, in the fourth paragraph when you say "talked about letter". What were you referring to there? * * *

【178】 * * *

(Brief recess.)

Hearing Examiner Schrup: Back on the record.

Testimony of Joseph Malone

By Mr. Mathias:

Q. Mr. Malone, can you identify Commission Exhibit 76 with subparts and 77 and 78 with subparts? A. Yes, sir.

Q. What are these documents? A. The documents represent data in connection with the changes in cost incurred as a result of changed wage contract rates, changes in other wage costs.

Q. Were there container cost increases included in these computations as well, sir? A. Yes, sir.

Q. Referring to Commission Exhibit 79, can you identify this document? A. Yes, sir.

Q. What is it, sir? A. It shows the average increased cost per point covering 1966 union contract changes, 1965 contract changes, increases in Pure-Pak container costs and increase in Social Security taxes.

Q. Mr. Malone, who prepared Commission Exhibit 79? A. I did, sir.

【179】 Q. Who prepared Commission Exhibits 76 through 78 with various subparts? A. The 77-A was prepared by me. The remaining data was prepared by various accounting people under my direction.

Q. That was under your direction and control? A. Yes, sir.

Q. Is the data in Commission Exhibits 76 through 78 the underlying data for Commission Exhibit 79, sir? A. Yes, sir.

Q. Mr. Malone, what was the purpose of Commission Exhibit 79? A. The purpose of Exhibit 79 was to secure an increase in our price to our customer which recognized these changes.

Q. That is, secure an increase in your price to A&P? A. That is right.

Q. Was this document, Commission Exhibit 79, prepared to be shown to A&P or was it prepared for internal purposes? A. It was prepared for both.

Testimony of Joseph Malone

Q. Are the estimated average increased costs per point listed on Commission Exhibit 79-A applicable to the A&P sales in particular? A. No. We had to take the total increases and relate it to our total volume.

Q. Were you instructed by Mr. Minkler to prepare this document? A. No, sir.

【180】 Q. Why was it prepared then, sir? A. It was prepared in conjunction with the discussions between Mr. Gose and myself.

Q. Who is Mr. Gose? A. Mr. Gose was then in charge of the Chicago Metropolitan milk operation.

Q. His name is spelled G-o-s-e? A. G-o-s-e. Yes, sir.

Q. Was this document then prepared at the instance of Mr. Gose, at his request? A. It was prepared at his request, yes.

Q. Do you know whether this document was delivered to A&P? A. Actually, as far as delivery per se is concerned, I can't recall but I do know that the document was reviewed with our customer.

Q. That is with A&P? A. That is right.

Q. Who reviewed the contents of this document with A&P? Who participated in the negotiations? A. Mr. Gose and myself.

Q. So you did participate in these negotiations personally? A. Yes, sir.

Q. Mr. Malone, I hand you Commission Exhibits 82 through 86 with various subparts and ask you to glance through these documents, sir.

* * * * *

AFTERNOON SESSION

【184】

1:45 p.m.

Hearing Examiner Schrup: On the record.
You may continue, Mr. Mathias.

Testimony of Joseph Malone

JOSEPH F. MALONE resumed the stand and testified further as follows:

Direct Examination by Mr. Mathias (continued):

Q. Mr. Malone, I hand you Commission Exhibit for identification 87-A through C. I would like you to familiarize yourself with this document, sir.

Let the record show that I am handing Mr. Malone the original of this document.

Let the record show that this exhibit is a 3-page document containing various computations, the first page of which is entitled "Summary of operating results, sales to Great Atlantic and Pacific Tea Company", dated 6-19-66.

Mr. Malone, can you identify this document? A. Yes, sir.

Q. Who prepared this document? A. I did, sir.

Q. What is it, sir? A. The three documents representing 87-A, B, and C, were developed in an attempt to reconcile our position as to which would be the best course for us to follow. Number one, we had [185] the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what our position would be, either lose or gain, and relate that to where we would be if we lose all of the business.

Hearing Examiner Schrup: All of the A&P business?

The Witness: All of the A&P business, yes.

By Mr. Mathias:

Q. Why was this document prepared, Mr. Malone? A. I think it is a very important economic consideration on the part of our company in this regard.

Q. At the time this was prepared had you received any

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response from A&P concerning your request for an increase in prices based on the increase in labor and container costs? A. I can't recall.

Q. Were the computations in Commission Exhibit 87-A through C shown to A&P? A. I don't know.

Q. Were they prepared to be shown to A&P? A. I did not prepare them for that purpose.

Q. Did you prepare them for the purpose of internal guidance for Borden? A. Yes, sir.

Q. Your answer was yes? A. Yes.

【186】 Q. Mr. Malone, at the time that Commission Exhibit 87 was prepared did you feel you were in danger of losing the A&P business? A. No, sir.

Q. Mr. Malone, I hand you Commission Exhibits 88-A through F for identification. I ask you if you can identify these documents. A. Just rough working papers with determination of summaries—I don't know what.

Q. Would it appear they bore a relationship to the increase in labor costs previously referred to? A. I wouldn't know.

Q. Were these work papers prepared by you, Mr. Malone A. No, sir, except 88-F.

Q. Commission Exhibit 88-F was prepared by you? A. That is right.

Q. Can you tell by looking at Commission Exhibit 88-F to what that document referred, sir? A. It referred to wage costs. How it was used I don't know.

Q. Now I hand you Commission Exhibit 89 for identification and ask you if you can identify this document, sir. A. Yes, sir.

Q. What is this document, sir? A. It is just rough working papers in connection with our delivery costs.

【187】 Q. This was prepared by you, sir? A. Yes, sir.

Q. Can you tell under what circumstances this paper was written, sir? A. No, sir.

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Hearing Examiner Schrup: Did you keep files on these papers?

The Witness: I beg your pardon?

Hearing Examiner Schrup: Did you keep files on these papers? For example, did you have such a thing as an A&P file and put all the papers on A&P in?

The Witness: Yes, sir. I think this is where all the materials came from.

Hearing Examiner Schrup: You put them in the A&P file or the Borden file? The name in the Borden offices was entitled "A&P File"?

The Witness: I can't tell you exactly what it was titled but it related directly to the project.

By Mr. Mathias:

Q. I hand you Commission Exhibit 90-A through D for identification. Commission Exhibit 90-A and B is a memorandum entitled "File memo, A&P," which appears to be dated 6-29-66, and 90-C through E a typewritten transcription thereof. A. Yes, sir.

Q. Have you also read the typewritten transcription, [188] Mr. Malone? A. I haven't read it word for word, but I think it is generally the same.

Q. Can you identify this document, Mr. Malone? A. Yes, sir.

Q. What is it, sir? A. It is a document in relationship to our consideration of securing an increase in the price to our customer to cover increased wage costs.

Q. This customer was A&P, sir? A. Yes, sir.

Q. Who wrote this document? A. I did, sir.

Q. Is the typewritten transcription thereof an accurate one? A. Yes, sir.

Q. Why was this document written, sir? A. It represented our discussion with Mr. Pentz and Mr. Comfort in

Testimony of Joseph Malone

regard to securing a proposed increase, selling price increase.

Q. Who was Mr. Comfort? A. Mr. Comfort was an assistant to Mr. Pentz.

Q. Were they employed by Borden? A. Yes, sir.

Q. And in what office? A. The New York corporate office.

【189】 Q. Was this memorandum written in keeping with your general practice of writing memoranda concerning such meetings and conferences? A. In regard to, you know, major projects.

Q. Under what circumstances was this memorandum written, Mr. Malone? A. What do you mean by circumstances, sir?

Q. Did this involve a conference, a personal conference between you and Mr. Pentz and Mr. Comfort, or was it a telephone conversation, or what gave rise to this memorandum? A. I would say it was a telephone conversation.

Q. Did anyone else from the Chicago office participate in this conversation, to your knowledge? A. I can't recall.

Q. I see in the last paragraph on the second page of Commission Exhibit 90 there is a mention of Ralph. Would that be Ralph Minkler, Mr. Malone? A. Yes, sir.

Q. Was he then still in charge of the Chicago area operation? A. I don't know.

Q. Referring to the typewritten transcription, Mr. Malone, on the second page thereof, that would be Commission Exhibit 90-D, the first full paragraph there is mention of the opening expense of the Woodstock plant. A. Yes, sir.

【190】 Q. What is meant by this, sir? A. What was meant is that at the time negotiations were being held with our customer that our Woodstock plant was just in the stages of being opened. Therefore, it was very difficult to try to relate wage cost from one period to the other and operating factors from one period to the other.

Testimony of Joseph Malone

Q. You also mentioned in the last sentence of that paragraph that your total labor cost per point had been affected by increased distributor volume. What did you mean by this, sir? A. During the period the company was fortunate enough to secure additional distributor business.

Q. You also mentioned that during most of that period A&P volume had decreased. Do you recall what you meant by this statement, Mr. Malone? A. What paragraph is that on?

Q. That is in the last part of the last sentence of the same paragraph. A. This could only mean that the volume which we sold to A&P had decreased from the level it was at the time we were negotiating.

Q. Mr. Malone, I hand you Commission Exhibit 177-A through C, the first page of which is a letter to Mr. Jack B. Pentz from Ralph R. Minkler dated January 3, 1965, and the last two pages contain a series of figures entitled "All stores sales—a comparison, 1965-1964."

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【210】 * * *

Q. You had nothing to do with the billing procedure? A. No, sir.

Q. Mr. Malone, early yesterday morning when we were discussing your background and experience you mentioned that you had conducted only two cost studies in which time and motion studies were included. Did you from time to time during your employment with Borden conduct other cost studies concerning the cost of delivery and service on your Borden routes? A. I would imagine from time to time there was analytical review made of elements of cost, but time and motion studies of the kind that I have referred to early yesterday morning were entirely different.

Q. These would be what, full blown cost studies? A. That is right.

Q. Others would be— A. Just analytical review.

Testimony of Joseph Malone

Q. Did you conduct this type of review quite frequently during your employment with Borden? A. I don't know what you mean by quite frequently, sir. Quite frequently to me could mean every day, every week, every month. Any studies that I had to do would be dependent upon the issue that was involved. It was not a recurring matter.

Q. If a particular problem arose in your sales or your routes, then you would be called upon to study the situation? **[211]** A. If a matter was assigned to me.

Q. I think one of your duties was controller of the central district during the course of your employ with Borden, was it not, sir? A. That is right.

Q. Would a major portion of your concern in that position deal with the costs of Borden in its various operations? A. It would deal with the overall results that revolved from the records of sales, cost of sales, and the bottom line.

Q. What do you mean by the bottom line? A. Profit.

Q. This is the point where the sales turn to a profit level, is that what you mean, sir? A. This is the name of the game. This is what you are in business for.

Mr. Mathias: No further direct, Your Honor.

Hearing Examiner Schrup: You may cross-examine.

Cross Examination by Mr. White:

Q. Mr. Malone, you stated during your direct examination that during the period 1964 and subsequent thereto you were a vice-president in charge of government controls or regulations. Is that correct? A. That is right, sir.

Q. Was this a corporate officer position with Borden? **[212]** A. No, sir. It was a division or district position.

Q. Were you at any time during your 42 years with Borden ever an officer of the corporation? A. No, sir.

Testimony of Joseph Malone

Q. Mr. Malone, there has been a lot of discussion for the last two days about cost accounting, and a review of your background. During the period 1964 until the end of your employment with Borden did Borden regularly keep, with respect to the Chicago Metropolitan area, cost accounting records on a product and container size basis? A. No, sir.

Q. Did Borden during this period of time with respect to the Chicago Metropolitan area keep such cost accounting information by customer? A. No, sir.

Q. Cost accounting, as I understand it, involves among other things the problem of the allocation of joint costs? A. That is right.

Q. And the allocation of indirect costs? A. That is right.

Q. In the accounting profession is there more than one recognized procedure for assigning joint costs or allocating indirect costs? A. There are various approaches to the problem.

Q. In your opinion has the accounting profession developed [213] a single approved method of cost accounting? A. I would say no.

Q. During your direct examination you were shown a great many working papers. For example, Commission Exhibits 13, 17, 20, 54, with various subparts. Did any of these documents represent on your part a detailed cost accounting approach? A. No. They represented a general approach to the problem.

Q. As a matter of fact, isn't it true that Borden's accounting records are such that the cost figures that you have readily available to you are on broad product classification? In other words, milk and milk by-products, for example, on the one hand? A. Yes, sir.

Q. Isn't it also true that the records that are regularly kept by Borden with respect to expenses are kept in broad categories such as the cost of wholesale delivery or the

Testimony of Joseph Malone

cost of retail delivery or sales expense, gross figures? A. Basically, the fundamental material available from the Borden records is in total dollars covering the operation not separated at all between whether it is retail, wholesale or bulk wholesale.

Q. So that is a cost accounting approach one of the first steps would be to try to allocate those costs by function in a definitive way and by the customer who receives that function if you were to follow a cost analysis, is that correct? A. If you were doing it in a very detailed scientific [214] way that is correct.

Q. During 1965 when you were using the general figures that were available to you, what is your best memory as to whether or not the Woodstock plant had been in operation for any extended period of time? A. I can't recall how long it had been in operation.

Q. Was this generally, however, during its earlier period of operation? A. Yes, sir.

Q. Did Borden experience any difficulties in the operation of the Woodstock plant during the early period? A. I think it had the normal setup difficulties there are related to a new plant, especially one that is fully automated as Woodstock was.

Q. In one of these exhibits that counsel went over with you yesterday there was, for example, reference to the Irving Park Branch. Do you recall that, sir? A. Yes, sir.

Q. Was the Irving Park Branch in continuous operation from that point on until the time you left the employ of Borden? A. No, the Irving Park plant had been closed and operations ceased at that point, sometime before I terminated my position with Borden.

Q. During the course of your direct examination today a good deal of time has been spent on the question of the increases in [215] wage costs subsequent to the time when Borden began to supply private label to A&P in the Chicago area. For example, I believe you identified and discussed

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to some extent Commission Exhibit 79. Mr. Malone, were the costs reflected on Exhibit 79, and the similar calculations you reviewed direct costs easily identifiable with A&P? A. No, sir.

Q. So that these calculations necessarily involved an allocation of costs shared by more than one customer? A. Yes.

Q. And with respect to different products? A. Yes, sir.

Q. Is it your opinion that the development and allocation of the costs represented by Commission Exhibit 79 and the similar data that you have reviewed is the only possible cost accounting basis for the assignment of those figures? A. Yes, sir, it is my opinion that it is the only assignable way.

Q. There would be no other manner in which, under other accepted cost accounting principles, that they could be assigned? A. I could indicate that through proper analysis of each route a result could be obtained.

Q. And that might give a different result than the one that is shown, for example, on Commission Exhibit 79. A. It could very well.

【216】 Q. Now, the contemplated private label program with A&P involved, as I think you have pointed out, some different method of delivery and sale than was then being used with respect to that customer in the Chicago area, is that correct? A. I didn't get the question.

Hearing Examiner Schrup: Read the question back, please.

(Question read.)

The Witness: That is right.

By Mr. White:

Q. So that at the time you were preparing many of the informative schedules that you prepared for management

Testimony of Joseph Malone

you did not have available to you a situation from which you could make a cost analysis based on the kind of service you were actually going to give A&P in the future, is that correct? A. That is right.

Q. Mr. Malone, how many times did you meet with any representative of A&P concerning the private label program prior to the time that Borden actually began to supply a private label to A&P? A. I met with A&P personnel at the time I visited with Mr. Schmidt and I met with A&P personnel at the time we visited with A&P personnel covering the reconciliation of the differences in cost between the New York and the Chicago market.

Q. In other words, you met with them twice during that period. **【217】** A. That is right, sir.

Q. I believe you testified yesterday that Commission Exhibit 19-A through H for identification was a memorandum covering the first of those visits? A. That is right, sir.

Q. I direct your attention to the sixth page of that memorandum which is Commission Exhibit 19-F, and particularly to the last paragraph on that page which commences with the sentence, "Schmidt expressed an interest factor—he hoped this private label program might be productive of \$500,000 annually, which was the gross annual contribution of approximately ten good sized stores."

During your direct examination you were asked a question about a subsequent sentence in that paragraph insofar as what you recalled had happened in Wisconsin. Will you please tell the Hearing Examiner now to the best of your recollection what was said at the meeting with Mr. Schmidt that is reported in that paragraph? A. To the best of my recollection after Mr. Schmidt had indicated this computation and recognizing the fact my whole visit was tied into an attempt to provide some sort of—call it education, if you will, as to our business, I indicated to him that what he was looking at basically was tied to the current

Testimony of Joseph Malone

out-of store price, and that some of the exposure I have had recently in Wisconsin in regard to private label milk [218] pointed out that that might not be the case, so that I didn't want him to assume in any way that \$500,000 based upon current selling prices by A&P might hold up.

Q. Mr. Malone, what was your purpose in pointing this out to him? A. My purpose in pointing this out to him was two-fold. Number one, I think like the rest of us in Borden we had great pride in our own product. It was possible to negate that private label concept. We felt this was a good approach to the problem. Secondly, I wanted to make sure that in no instance did he believe he was guaranteed this sort of gross margin contribution.

Q. So that in part you were trying to do a little negative selling against the private label program? A. Yes, sir.

Q. On the other you want to make sure he didn't go away with any concept that any sort of an amount had been guaranteed to him? A. That is right.

Q. Now, the second meeting I think you referred to was with Mr. Bartels. A. Mr. Minkler had an appointment with Mr. Bartels.

Mr. White: Mr. Hearing Examiner, what designation does the Hearing Examiner prefer that Borden use with respect to exhibits?

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[224] * * *

By Mr. White:

Q. Mr. Malone, subsequent to the time that Borden commenced delivering private label to A&P, was it brought to your attention by anyone in the Borden organization that Borden had made offers to other store customers in the Chicago Metropolitan Area at prices similar to the private label prices being charged A&P by Borden? A. Yes, sir.

Testimony of Joseph Malone

Q. Who would be one of the people that would come to your mind who brought this to your attention? A. The first contact that I know of was that Mr. Gose advised me that he was carrying on negotiations with the Kroger Company.

Q. Approximately in relationship to the time that Borden commenced serving A&P with private label, approximately in relation to that, how long was it after that? A. I would say it was recently subsequent to the delivery of private label milk to A&P.

Q. What, if anything, did Mr. Gose report to you about his negotiations with Kroger to sell Kroger milk and milk products at prices similar to those Borden was charging A&P for private label? A. He felt very positive about the negotiations as they progressed, but the final consummation of the negotiations is that Borden did not receive the business because the prices [225] that Borden offered were higher than Kroger was enjoying at that time.

Q. Who was supplying Kroger at that time? A. Bowman Dairy Company.

Q. This was in the Chicago Metropolitan area? A. That is correct, sir.

Q. Can you recall another instance where it was reported to you that Borden solicited another store customer in the Chicago Metropolitan area at prices similar to the private label prices that Borden was charging A&P? A. Yes, sir.

Q. Who was this that reported? Consolidated Foods Corporation.

Q. Who reported this to you, Mr. Malone? A. Mr. Gose.

Q. And the customer was Consolidated Foods? A. Yes, sir.

Q. Again using the point in time of the commencement of the service of private label to A&P as a point of reference, was this subsequent to that? A. It was subsequent to the Kroger approach.

Q. It was subsequent to the Kroger approach? A. Yes.

Testimony of Joseph Malone

Hearing Examiner Schrup: You used the term "similar". What do you mean by that?

【226】 Mr. White: I am using the words out of the complaint.

Hearing Examiner Schrup: You answered yes, similar. Were the exact prices quoted to you that were being used?

The Witness: I can't recall the exact prices, but it was similar, you know, generally close.

Mr. White: I derived my language from the complaint, Your Honor. That is the charge.

Hearing Examiner Schrup: Very well.

By Mr. White:

Q. Aside from Kroger and Consolidated Foods, was it brought to your attention that similar offers were made to any other customers? A. The National Tea Company.

Q. Who was the supplier of National Tea Company? A. Hawthorne Melody Dairy.

Q. This again was in the Chicago Metropolitan area? A. Yes, sir.

Q. What, if anything, were you told about the success of Borden's attempt to secure the National Tea business? A. We weren't successful.

Q. Was there any other customer, Mr. Malone, that was reported to you that an offer of this type was made to? A. These are the three I can distinctly remember.

Q. Mr. Malone, before, during, or after the negotiations with A&P concerning private label did you ever discuss with any 【227】 representative of A&P the price at which A&P was going to sell milk out of store? A. No, sir.

Q. Did you ever discuss during that period of time with any representative of A&P what they were selling milk out of store for? A. No, sir.

Q. And by milk, I am including milk byproducts. Is the answer the same? A. Yes.

Testimony of Joseph Malone

Q. During that period of time, namely, before, during, and after the negotiations on the private label for A&P, were you ever present when any representative of Borden discussed with A&P the price at which A&P was selling milk or milk products or the price it intended to sell milk or milk products out of store? A. No, sir.

Q. Did any representative of A&P directly to you or in your presence discuss the price at which A&P intended to sell milk and milk products out of store, or was actually selling such products out of store? A. No, sir.

Q. Were you ever present when an agreement was entered into between Borden and A&P concerning the price level at which a A&P would sell private label milk products out of store? **[228]** A. No, sir.

Q. Mr. Malone, my last series of questions has related to basically the private label product. Did you ever discuss with A&P at any time the price at which A&P was going to sell or was selling Borden label products out of store? A. No, sir.

Mr White: That is all, Your Honor.

Hearing Examiner Schrup: Off the record.

(Discussion off the record.)

Hearing Examiner Schrup: Before you start your cross-examination, Mr. McInerney, let's take a short recess. The witness has been on the stand for some time.

[229] Hearing Examiner Schrup: On the record.

Mr. McInerney: Before we commence our cross-examination, I would like to note briefly, as you know, it is A & P's position that this deposition is premature until we receive discovery from the Federal Trade Commission and from Borden which we have not yet received.

Testimony of Joseph Malone

I understand Your Honor has overruled that objection. So we will proceed with our examination with that reservation.

Hearing Examiner Schrup: You may proceed.

Mr. Mathias: I would like the record to note at this point, Mr. Examiner, that Complaint Counsel in keeping with his statement at the last pre-trial on January 12, has made its records available and open to Respondent A & P, and Respondent Counsel for A & P has reviewed our files, and we are in the process of making copies of certain requested documents available to A & P.

Hearing Examiner Schrup: The record will so show.

You may proceed, Mr. McInerney.

Mr. McInerney: In the course of Mr. Malone's direct examination there was reference to an interview report which I would like to request that Commission Counsel turn over directly to us for purposes of cross-examination.

Hearing Examiner Schrup: I will have to look at the report.

* * * * *

【237】 conferences with other people in Borden to which these memos refer? A. In some cases, yes, maybe, but others, no. I think in the cases where I was asked direct questions as to that, if I answered it in the positive, that meant that I had some recollection. I don't recall what instances they would be, but generally after seven years, I can assure you, sir, it is very difficult to have complete, you know, personal knowledge of what took place.

Q. I understand that. I was simply trying to clarify for the record whether you were repeating something from a piece of paper in front of you or whether you were giving us your present recollection of events. A. When I an-

Testimony of Joseph Malone

swnered on the direct any positive factor, I was answering due to my recollection of what took place.

Q. I believe you told us that none of the documents you have seen in the past two days here, in the time period we are discussing, related to any actual cost study of supplying A & P with private label milk in the Chicago area, is that correct? A. By cost study, you mean a sophisticated cost study which would go into the factor of, maybe, time, motion, and everything else that would be involved?

Q. Yes, sir. A. Yes, sir.

【238】 Q. Also, I mean a study directed specifically to the cost of doing business with A & P as distinguished from other wholesale customers. A. That is right.

Q. In other words, there were no such study on the basis of which these documents were prepared? A. No.

Q. Directing your attention to Exhibit 13 which you have before you, I note that in various places you have used the language "estimated savings", "estimated adjustment", "estimated adjusted store wholesale profit per month", "estimated operating profit", and so on.

Looking, for example, at Exhibit 13-N, I note that there is a footnote with respect to container cost reads, "Same as St. Louis proposal," and there is a footnote with respect to production expense that reads, "Same as New York." Does that mean that in estimating those costs you used figures derived from St. Louis and from New York respectively? A. That was because of the fact that the Woodstock Plant was in the offing, that any data that I had here in Chicago really had no applicability. So these elements appeared to be more reasonable to use in the estimated development of the data and past history.

Q. So you used the figures that were used in quoting prices in St. Louis with respect to container cost and the figures with respect to New York with respect to production expense? A. That is right, sir.

Testimony of Joseph Malone

Q. In making this study and similar studies such as the study that is reflected in Exhibit 17, you did not have sufficient experience with the Woodstock Plant on which to base any cost estimates with respect to what that plant might produce by way of efficiencies and so on? A. That is right, sir.

Q. Now, in Exhibit 17, and Commission Counsel can verify this by reference to Exhibit 17-L, you have used the same figures for container cost and production expenses. Does that indicate that at that time you were continuing to use the St. Louis cost and the New York cost with respect to that study? A. I think we used the—we were pretty consistent throughout the development of the data. Without comparing each one, I can't say exactly, but I think we were consistent, sir.

Q. I refer you to 13-F, Mr. Malone. In 13-F there are estimates for advertising and merchandising expense, general sales, administrative and district general operating and supervision, credit collection, other increases or deductions. And you have taken certain figures with respect to each of [240] those items and multiplied those by the number of points that were distributed from the wholesale routes from two of your branches. Is that correct? A. That is correct.

Q. Now, were those expenses set forth opposite each of the items that we have just recited based on any experience specifically with A & P? A. No, sir.

Q. Is it possible that the credit and collection expense, for example, for A & P would be much less than the figure shown there? A. I would say it would.

Q. With respect to the advertising and merchandising expense, if you were selling private label milk to A & P, is it possible that that item would either be reduced or eliminated? A. That is right, sir.

Q. So that these figures do not relate to the cost of

Testimony of Joseph Malone

supplying A & P with private label milk, is that correct?
A. We did not make any studies of A & P specifically.

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【248】 with Mr. Schmidt on May 26, 1965, Mr. Malone, Mr. Mathias showed you a copy of Commission Exhibit for identification Number 4, which is a cost study regarding private label milk from Borden's Madison-Milwaukee plants and asked you to read some figures from that exhibit.

Can you tell us from the best of your information were those figures in Exhibit 4 shown to anyone from A & P at any time? A. Not by me, sir.

Q. Do you have any knowledge that it was? A. I have no knowledge that it was.

Q. As a result of your meeting with Mr. Schmidt on May 26 and what you had heard from others at Borden concerning him, would you say that Mr. Schmidt was a sophisticated buyer in the dairy business? A. I think he was a very good buyer in the dairy business.

Q. Did he know about the milk order market prices and the various components that you testified to? A. My visit with Mr. Schmidt at that meeting would have indicated to me that he wasn't totally familiar with the dairy economics that were involved in milk order regulations.

Q. And that is why he wanted to get some information from you with respect to the basic economics of the business, is that correct? A. My people the Borden executives, felt it would be 【249】 helpful if Mr. Schmidt did get a little more information in regard to milk marketing programs.

Q. Do you know if he ever acted as a buyer of milk or dairy products prior to this time? A. I wouldn't know, sir.

Q. Commission Exhibit 54 for identification, which has been shown to you previously, Mr. Malone, has a series of entries similar to the ones we discussed previously. That

Testimony of Joseph Malone

is, it refers to local advertising expense, national advertising expense, general sales overhead, merchandising expense, and so on.

Now, am I correct that none of that would be applicable in sales of private label to A & P? A. That was the particular reason why I separated it here. I considered that it would not be applicable.

Q. Now, the first private label offered to A & P that was discussed here, I believe, was on the basis of a half cent a point, just in general terms and without reference to any particular package so that we don't get into that. A. Yes.

* * * * *

【255】 The Witness: That is what I had answered, sir.

Hearing Examiner Schrup: Now, the question is whether you consider that you have an opinion as to how remote that time might have been between those other two parties.

Mr. McInerney: It seems to me that is a question that is obviously asked of a person that can't have had personal knowledge of it on the basis of his prior testimony.

Mr. Mathias: Your Honor, this witness is knowledgeable as to the procedures followed in the office of Borden. I think based on that knowledge he can state his opinion as to whether or not the meeting between Mr. Tarr and Mr. Schmidt, as in the case of this particular memorandum, was remote in time from the time the memorandum was prepared.

Hearing Examiner Schrup: Did these people that reported to you customarily report promptly?

The Witness: I had considered that they did, sir.

Mr. McInerney: Your Honor, this again is not on the basis of personal knowledge necessarily.

Testimony of Joseph Malone

Hearing Examiner Schrup: As you recall it, some seven years ago, was that the practice?

The Witness: As I recall it, some seven years ago, sir, I considered that they reported promptly. As of the date that they had their transaction, I am not qualified to say.

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Testimony of Ralph R. Minkler

June 12-13, 1973

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【102】 * * *

Q. Two percent milk? A. That is right, thank you.

Q. So that these products and possibly a few others would constitute the milk line of products and when you are discussing a milk plant you are discussing a plant that could— A. Could handle all of them.

Q. Now, did the Woodstock process make the entire milk line of products? A. Oh, yes.

Q. You had mentioned earlier that you probably started in the Woodstock area with the half gallons because this was a very important item.

Was the half gallon at this period of time in the mid-1960s your most important item in the Chicago area in terms of volume? A. I believe so.

Q. Did you also in the Chicago metropolitan area have any other types of facilities besides the processing plant such as distribution depots, receiving stations? A. Yes, we had a milk distribution location near O'Hare in Roseland. This was the spot where packaged product was **【103】** received from Woodstock after we got Woodstock going. The product was brought into this distributing location. It was palletized on the semis which brought it in and the product was moved into chill rooms right there and loads for retail and wholesale routes were then assembled and sent out from that distributing location.

Q. This would be on smaller trucks? A. That is right.

Q. Did you also have a distribution station in Hammond? A. Yes.

Q. And this would be following the— A. Similar pattern.

Q. Do you recall approximately what distribution area

Testimony of Ralph R. Minkler

was served out of the Hammond distribution center? A. Well, the northwest corner of Indiana including South Bend and the southwestern corner of Michigan were served out of there. Hammond, Gary.

Q. Did any portion of the milk supplied to Hammond come back into Illinois on routes adjacent to the Indiana line by any chance? A. I don't think so. I am not sure about that. I really don't know.

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By Mr. Mathias:

Q. From the mid-1960, 1964 and 1965, what was the position of Joseph Malone in the Chicago Central District? A. Well in 1964-65 specifically he was a Vice President with the title Vice President Regulatory Controls.

Q. And in this position what were his duties? A. He was primarily involved with keeping abreast of any state or federal regulations affecting our business and consulting with our people and conformance and interpretation, that sort of thing.

Q. Now, did he serve directly under you or did he serve under some other head in this division? A. He served under me.

Q. So Mr. Malone reported directly to you? A. That is right.

Q. At this period of time, was he a part of the management group of the Chicago Central District? A. Oh, yes.

Q. Did he participate in matters and problems other than governmental controls? A. He did considerable cost analysis that was required from time to time.

Q. This would be in connection with any matter that you required cost accounting? 【112】 A. That is right.

Q. Was Mr. Malone your principal advisor insofar as

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cost problems were concerned in the District? A. Yes, he was.

Q. And did he have any other duties aside from these cost accounting duties and his duties as a consultant on governmental and state controls? A. Well, just in a general sense he was as you have already asked me if he was a part of the management group. He certainly was. He was involved in decision making discussions and as to additional specific assignments I guess I can't answer you.

I don't know just what you mean.

Q. Well, as a part of the management group if there was a major problem of any type involving the Chicago Central District, was he involved in discussions? A. Yes, he was.

Q. And was this considered a part of his duties with the Chicago Central District to consult and participate in such problems? A. Absolutely.

Q. Now, prior to being appointed Vice President of Regulatory Controls, in what position did Mr. Malone serve? A. For a number of years he was District Comptroller. He was the top accountant for the District.

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【120】 * * *

Q. In comparison to A&P as a customer, your sales to the Kroeger Company stores, how would they compare to the A&P sales in general? A. Much less in the Chicago metropolitan markets. Much less.

Judge Hinkes: Which would be much less?

The Witness: The Kroeger sales would be much less than the sales through A&P.

By Mr. Mathias:

Q. Borden did not serve all the Kroeger stores in the Chicago area, did they, sir? A. No, they did not.

Q. Were the Kroeger stores sales limited to any particular areas or were they spread throughout the entire

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metropolitan area? A. The stores that we had, if I recall correctly, were primarily in the suburban areas, the Kroeger stores.

Q. Who served Kroeger, if you recall, within the Chicago City area? A. I believe it was largely Bowman.

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【184】 Judge Hinkes: Consistent with my ruling, I must receive these documents in evidence, and the objection is overruled.

(Commission Exhibit 12-A and B and Commission Exhibit 14-A through E were received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I show you Commission Exhibit 13-A through N for identification and ask you to briefly familiarize yourself with this document, sir.

Judge Hinkes: Off the record.

(Discussion off the record.)

Judge Hinkes: On the record.

Mr. Mathias, you have not offered your Exhibit 8, is that correct?

Mr. Mathias: No, Your Honor, I have not offered it yet.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Mr. Minkler, can you identify handwriting on Commission Exhibit 13-A through N for identification? A. Yes.

Q. Whose handwriting is it, sir? A. It is Joe Malone's handwriting.

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Q. Are you familiar with this document? A. No, I would have to study it. This would take me some * * *

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【193】 Mr. White: I was referring to 0011 at the bottom of the page, Your Honor, per half-gallon.

Judge Hinkes: Yes.

Mr. White: But yes, that is right, if you are taking the—

Judge Hinkes: Yes, I see where it has been multiplied, in effect, by 4.

Mr. White: Yes, sir.

Judge Hinkes: You may continue, Mr. Mathias.

Mr. Mathias: Your Honor, I offer Commission Exhibit 18-A through P in evidence.

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: Without objection, it is received.

(Commission Exhibit 18-A through P was received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 19-A through H for identification and ask you to familiarize yourself with this document, sir.

Do you know who prepared this memorandum, Mr. Minkler? A. Yes.

Q. Who prepared it, sir? A. Joe Malone.

Q. And was it submitted to you? A. Yes, it was.

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【200】 * * *

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 21-A through U for identification and ask you to familiarize yourself with this document, sir.

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Mr. Minkler, are you familiar with Commission Exhibit 21-A through U? A. I have just been refreshing my memory on it, yes. It is another quotation.

Q. What is this document, sir? A. It is a quotation, another quotation submitted to A & P.

Q. And was this submitted to A & P on or about the date shown on the various pages revised July 26, 1965? A. I am sure it was.

Q. What was the purpose of this revised quotation, sir? A. Again to bring out all the details pertaining to areas 2, 3, 4, 5, and 6, and it is again a sales tool, this last schedule or the last sheet, used in an effort to try to sell the customer on the tightness of our quotation.

Mr. McInerney: May the record note that the witness is referring to 21-U as the last sheet.

The Witness: That is right.

By Mr. Mathias:

Q. 21-A through T, I take it, sir, are the particulars of the quotation you made to A & P at that time? 【201】 A. That is right.

Q. And this again did not relate to area No. 1, the Chicago-Calumet area, is that right, sir? A. That is right.

Q. And I take it then, that your earlier offer, the February offer, was still in effect for that area? A. I believe that is right.

Judge Hinkes: Was this also communicated to A & P?

The Witness: Yes.

Judge Hinkes: By whom?

The Witness: By Gordon Tarr.

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Mr. Mathias: I will offer Commission Exhibit 21-A through U into evidence.

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: It is received.

(Commission Exhibit 21-A through U was received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 23-A through I for identification, 24-A through F for identification, 25-A 26, 27 and 28 for identification and ask you to familiarize yourself with these documents, sir.

I would like to add to that list 24-G, which I accidentally omitted.

Mr. Minkler, can you identify these various documents? **¶202** A. To a certain extent, yes. They are a study comparing New York cost of milk with Chicago's.

Q. Under what circumstances was this study prepared? A. I can't recall the exact manner in which it came up, but I will give it to you broadly. Ira Bartels stated, I believe, to Joe Malone, though it may have been to Gordon Tarr, this was sometime after he had presumably—excuse me, I have to presume a little—looked over these last quotations that you just showed me.

Q. That is Commission Exhibit 21 that was just handed to you. A. Right, and the thought was expressed for one reason or another that he would certainly like to see a comparison between what we had been quoting and what was in effect in New York City, and I think this was about the last of July or very early in August.

At any rate, Joe Malone went to New York and spent four or five days and put all of this together.

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Q. And what happened then? A. Then—and again I am hazy as to a lot of specific detail, but, in effect, this is what happened.

Mr. McInerney: Excuse me, Mr. Minkler. I didn't want to interrupt you before, but I think no one wants you to speculate.

The Witness: Wait a minute. I can tell you what [203] happened in this respect. Malone went to see Bartels to discuss this and explain it to him, and by that time, Bartels just took the attitude well, I am not interested in that. Yes, all right, I may have asked for it, but that isn't what I am interested in.

I am interested in the best price I can get for a private label milk. This is clearly my recollection. I can't give you specific details as to times or all of the conversation, but that is what it amounted to.

By Mr. Mathias:

Q. Mr. Minkler, you were present, were you not, at the delivery of this document to Mr. Bartels? A. It is my recollection that both Malone and I went up there and were greatly surprised at his reaction. He didn't want it any more.

Mr. McInerney: May we know whether the answer is that it was delivered or it wasn't?

The Witness: It was delivered. It was delivered.

Mr. Mathias: I move Commission Exhibits 23-A through I, 24-A through G, 25-A, 26, 27 and 28 be received in evidence.

Mr. McInerney: Your Honor, may we know from Mr. Minkler whether his recollection is that all of

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these documents, to which Commission Counsel has just referred, were actually delivered to Mr. Bartels?

Judge Hinkes: Can you tell us, Mr. Minkler?

【204】 The Witness: I can't tell you. I know they were taken there, but I don't know how many he kept.

Mr. Mathias: Your Honor, if Complaint Counsel may interpose for a moment, I believe that I can identify each and every one of these documents as having—correction—with the exception of 24-F and G, which I am willing to retract from my offer—each and every one of the documents mentioned were received from A & P's files in response to a subpoena duces tecum.

Mr. McInerney: I believe that is correct, Your Honor. We don't know when A & P received them. That is all.

Mr. Mathias: The witness has pretty clearly stated that he personally, along with Mr. Malone, delivered them, he believed, in August of 1965. I think that is close enough.

Judge Hinkes: Is that correct, Mr. Minkler?

The Witness: Late July or early August is the best that I can give you.

Mr. McInerney: But you are not sure, Mr. Minkler, as to whether each of these pieces of paper that are before you were delivered, is that correct?

The Witness: That is correct.

Judge Hinkes: Then, what can you tell us? What do you mean that you are not sure whether they were delivered?

The Witness: I just started to say that Mr. Mathias has answered that. He said they came from A & P's files, so 【205】 they were left.

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Judge Hinkes: What is your recollection when you went up there and saw Bartels?

The Witness: My recollection is that he disdained all interest in this.

Judge Hinkes: Did you make a proffer of those documents, all of those documents?

The Witness: Of course we did. And I don't recall—I didn't recall—that is what I mean. I did not recall whether he kept them or not. I wasn't sure.

Judge Hinkes: Then as I understand it, this witness states categorically, that he offered these documents to A & P.

The Witness: That is correct.

Mr. McInerney: He seems to be relying in part, Your Honor, on Mr. Mathias's statement that A & P had some of these in their files.

The Witness: No, I am relying on the fact that they came from A & P's files. The inference is clear. A & P didn't get it out of thin air.

Mr. McInerney: Your Honor, we might have gotten them in the course of the investigation.

Judge Hinkes: That is right, but I think the documents are admissible. Make your argument upon the timing as you see fit.

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【213】 * * *

By Mr. Mathias:

Q. Do you recall the question, now, Mr. Minkler? A. What do you mean by unrealistic pricing? Yes.

Q. Just what do you mean by it, sir? A. We were, as I started to explain, concerned about the approach that competitors might make. One approach that we specially were worried about was the possibility of a competitor being so anxious to get this business that they would approach it on the basis of quoting price built up on direct costs

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only, that is, leaving out all fixed charges on the theory that fixed charges were already met by their present business.

We call that, for want of a better name, anyhow accounting. In other words, you have your fixed costs all taken care of by the volume of business that you presently have, and here is a nice choice hunk of business up for grabs, so you go in and raw milk is so much, the package is so much, the processing is so much and delivery is so much, and there is a chance that someone might approach this business on that basis and bid extremely low.

Q. Did you express this concern to A & P, sir? A. Yes, we did, and I can't exactly pinpoint from recollection how and when it was done, but it was done during conversations pertaining to their asking for additional bids. They told us they were going to ask for bids, and right away, Gordon Tarr, [214] because we had discussed this in our office, pointed out that they could get unrealistic prices on this kind of an approach.

Q. Did you have any discussions during this period with Mr. Bartels? A. Yes, I did. I had one discussion with him along the same lines, and he said that the only way that they could insure getting the best price possible was to ask for competitive bids.

Q. Mr. Minkler, I hand you Commission Exhibit 43-A through C. First I ask if you can identify the handwriting on Commission Exhibit 43-A? A. That is Malone's.

Q. I would like you to read Commission Exhibit 43-B and C for identification for the purpose of refreshing your memory, if you can, as to the circumstances surrounding the meeting between you and Mr. Bartels to which you have just referred.

Mr. McInerney: Excuse me, Mr. Minkler. Before you do that, I would like to object to this procedure.

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I think that the proper way is to see whether his memory needs any refreshing before any document is shown to him.

Judge Hinkes: Yes.

Mr. Mathias: I withdraw the last question.

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【222】 Judge Hinkes: No the document is admissible. Whether or not it has any impact upon Respondent A & P, however, is another question, and if it hasn't been communicated to A & P, it is going to be difficult, as I see it, to fasten A & P with any responsibility for the data contained in it.

The Witness: It certainly wasn't submitted to A & P. It was for internal use.

Judge Hinkes: In any event, then 37-A through F is received, 36-A through Z-8 is received, and 42-A through D is received.

(Commission's Exhibits 37-A through F, 36-A through Z-8 and 42-A through D are received.)

Mr. White: I understand with respect to 36-A through Z-8, that it is received except for the handwriting on it.

Judge Hinkes: Yes, that does not include any of the handwritten portions.

By Mr. Mathias:

Q. Mr. Minkler, you have testified concerning the notice from A & P of the decision to seek competitive bids and of your meeting with Mr. Bartels. What was the next event in the course of your dealings with A & P? A. I believe the next event was that Elmer Schmidt called Gordon Tarr—I can't give you the exact date. It certainly was after the middle of August, very close to the middle of August—and said Gordon, I want you to come up here

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right [223] away, and when Gordon went to the A & P office, he encountered a gentleman who was pretty distraught.

This is what Gordon Tarr reported to me, that Elmer Schmidt told him that he was terribly shocked, that they had received quotations which made ours appear—now I am not going to give you the exact words. I don't know the exact words, but it meant that it made ours appear ridiculous, and he just couldn't understand that.

He said, considering the fact that Borden had been a supplier of A & P for many years, and that the relationship had always been very friendly and cooperative, and that they had fully expected when they asked us to quote on private label, that they would get a sound price from us, but it didn't happen that way.

We have prices that are much better, from the standpoint of what they yield for us in savings, than your last quotation in which you detailed our savings at \$410,000.

Q. Was there any indication of how much below your offer the competitive offer was? A. No, there was not, but Gordon Tarr, struggling of course and trying to think of what he might do to salvage it and get Schmidt in a better frame of mind, said something to the effect that, all right, maybe we have overlooked something here. It is conceivable that we might further anticipate a reduction in in-store promotional activities, that if we were to eliminate [224] the practice of putting up display material and rearranging product in cases and things of that nature, which we lumped together and called in-store service, if we were to eliminate that, maybe we could increase this \$410,000 figure by \$50,000, and whereupon, Elmer Schmidt told him that that wouldn't begin to cover the differences between our quotation and the competitive offers that he had.

Q. Did you later attend a meeting yourself with Mr. Schmidt and Mr. Tarr? A. Yes, I did.

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Q. And did Mr. Tarr ask Mr. Schmidt to repeat these remarks to you? A. Oh, yes.

Q. And did he do so? A. He did. He did.

Q. What happened after Mr. Tarr came back and reported this meeting to you? What did your group do then? A. We got on the phone with New York, is what we did next.

Q. And what was the result of that discussion? A. I can't detail that exactly for you, but we were certainly reporting, just the way I have tried to describe to you, what had happened and that we still felt that we could go back there if we did it quickly. Elmer Schmidt at least didn't say I don't want to see you again. Gordon left it that, well now, just hold your horses a bit. I want to get back to our office [225] and see my associates, and I again can't give you the exact detailing of this, but at any rate, Gordon came back and we felt that there was a possibility, based upon the relationship we had had over a period of time, that we could still talk further if we had anything important to say.

Q. Was there any indication by Mr. Schmidt as to how many competitive offer or offers that we had? A. All I know is that it was plural. He didn't say a bidder or an offer. He said quotations, plural.

Q. Following your discussion with the New York office, what steps did you take to retain the A & P business? A. This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely pure guess. We had the \$410,000 figure in, we were clearly told that an additional \$50,000 wouldn't begin to cover the difference, there are a facts that we had to consider.

In addition to that, we had had this figure of one million six hundred some thousand dollars that it would cost us if

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we lost the business. We had to weigh that, and at some point, I said that it seemed to me that we had to consider doubling this \$410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume [226] for this brand-new plant that we were just bringing on stream.

We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.

I was told, save the business, and so Gordon Tarr—I had Gordon make an appointment again with Elmer Schmidt, and we went up there and this is when Gordon asked Schmidt to again relate, to go back over what he had said to Gordon about our \$410,000 quotation.

Mr. McInerney: Excuse me, I hadn't wanted to interrupt the witness' story before, but two things: I take it that this last testimony, Mr. Minkler, is the same meeting—

Mr. Mathias: Excuse me, Your Honor, I object to Mr. McInerney interrupting my interrogation of this witness. If he has an objection to make, let him make it.

Mr. McInerney: Yes, I will make it. I would move to strike that part of the witness' answer that starts, we were pretty well convinced that other people were offering or making an offer on the basis of anyhow accounting, or words to that effect—I don't have the verbatim in my notes—since there has been no testimony that that was the subject of a communication from the Borden Company to A & P,

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other than the 【227】 previous testimony with respect that somebody might come in with a bid based on anyhow accounting. But I don't believe that—I think what the witness was doing on this occasion was again reciting the operations of the mind of the Borden Company people.

Judge Hinkes: Yes. The witness has testified that at one point A & P was told that others might come in and overlook their fixed cost and give a very low price. The witness has further said that he thought others had done so when he was told by A & P that they had some very low bids. But that has not been at least so far, communicated by Borden to A & P.

Mr. Mathias: Your Honor, there was the past communication to A & P by the witness that competitors could be expected to come in with a bid based on anyhow accounting, but I would like to ask one additional question.

By Mr. Mathias:

Q. At this meeting that you are now discussing with Mr. Schmidt at which you and Mr. Tarr met with Mr. Schmidt, did you mention the subject of anyhow accounting at that meeting, Mr. Minkler? A. I don't recollect that I did.

Q. Did you make an alternate offer to Mr. Schmidt at this time? Did you offer the \$820,000 savings? A. I did.

Q. And what did you mention to Mr. Schmidt as the basis upon which this offer was made?

【228】 Mr. McInerney: Excuse me, Your Honor. I think we are again at a point where it is inappropriate to lead the witness. I think the question ought to be what was said and done.

Judge Hinkes: Yes. If this is critical, by all means let's be careful.

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By Mr. Mathias:

Q. What did you say to Mr. Schmidt when you made this new offer? A. I said, Elmer, we simply cannot lose this business. Now I don't know what approach anyone else had made, but you have made it clear to Gordon Tarr and to me that there is a very substantial difference between our quotations and the quotations that you got from someone else, and since you covered this with Gordon we have done a tremendous amount of discussing of this situation. We have got to hold this business. I am prepared today to tell you that we will double the savings figures that we submitted to you on the 13th. That will be \$820,000.

Q. Did you say anything else to Mr. Schmidt at this particular time concerning the basis of your offer? A. It is my recollection that the only thing I said was that we had no way of knowing really what had been offered to him, but we were doing this on the basis of meeting competition. This is what we hoped we were doing.

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The Witness: I understand.

Judge Hinkes: Now then, did you raise the question then of competitors pricing?

The Witness: I am sure I did, yes.

Judge Hinkes: How?

The Witness: In a general way. I don't know how I can say how. I know that I was trying to still appear logical from our standpoint. I was in a way half embarrassed not to be able to know what kind of a bid they might have, but obviously you couldn't ask, and you couldn't have gotten an answer if you did, so—

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By Mr. Mathias:

Q. Well, in the course of this discussion did you at any time mention the phrase, "anyhow accounting" to Mr. Schmidt in this discussion? A. I am sure that this phrase was mentioned sometime, but I don't know whether it was mentioned at this particular time.

Q. You have no present recollection of that. A. No, I do not.

Mr. Mathias: Your Honor, I move that pages 200 through 209 of the deposition transcript be received in evidence as corrected as CX 260 with appropriate subparts.

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【243】 Did we get the sub-lettering for that?

Mr. Mathias: A through J, Your Honor. That was correct.

Judge Hinkes: Very good.

260 A through J is received, being the deposition pages 200 through 209.

(Commission Exhibit 260 A through J was marked for identification and received into evidence.)

Mr. McInerney: May I remind Your Honor—and I apologize. I won't keep at this—but I would like to remind you that I had offered to bring in a portion of the deposition which is inconsistent with the purpose for which this is being offered and which I think would cover Your Honor's point with respect to a denial.

Judge Hinkes: You will have that opportunity and again if I was wrong the motion to strike is always available, and I will be glad to entertain it upon a proper showing.

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By Mr. Mathias:

Q. Now, Mr. Minkler, was anything stated at this meeting then concerning the spread of this \$820,000 to the product line? A. Yes.

Q. What was said in this regard, sir? A. Go back and spread it and let me see it. This sounds very interesting.

【244】 Q. And what did you do at this point, Mr. Minkler? A. We went back to the office and immediately went to work spreading it to various items and the various areas.

Judge Hinkes: This might be an appropriate time for a break.

Mr. Mathias: Yes, I think it might be, sir. We have been trying to line up our final exhibits for today, and I think we are sufficiently along with the witness so that we will be able to have made meaningful progress by seven, and possibly we could start at ten o'clock in the morning to give us all a few minutes extra rest.

Judge Hinkes: Well, in any event we will take a short break at this time and we will expect to break off for the day at around 7:00 o'clock, and we will talk about the time to resume tomorrow then.

(Brief recess taken.)

Judge Hinkes: On the record.
You may continue. Mr. Mathias.

By Mr. Mathias:

Q. I hand you Commission Exhibit 56 A through X and ask you to familiarize yourself with this document, sir. A. Yes, Mr. Mathias, I recognize it.

Q. Are you familiar with this document? A. I am.

Q. What is it, sir? 【245】 A. It is a spread of the \$820,000 to various items, including glass gallons.

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Q. Was this quotation tendered to A & P? A. Gordon Tarr and I either on the 14th or 15th went up to A & P with this intending to give it to Elmer Schmidt and he was not there. His wife was expecting a baby and he was home. So we gave the bid to his assistant. His name is Hall, Robert Hall. Bob Hall, I think. We gave it to him, and he said that he would see to it that Mr. Schmidt got the figures promptly.

Q. Now the glass gallons was a new item in your quotation, was it not, sir? A. We thought when we went back after that meeting where we first mentioned the \$820,000, we reasoned that we could put part of this spread part of this to glass gallons. They had at some time or other said that they thought the glass ought to be private labeled too, and we had some discussions about that because it wasn't very apparent how a glass jug could be made to convey a different label. All you had to work with was a small plug tab that went in the top of the glass bottle which you would change from Borden's to A & P or Ann Page, whatever they wanted.

So in putting this detail together we decided that well, we would put part of it on the glass containers and that is the way we gave it to this Mr. Schmidt, and Mr. Schmidt very shortly called Gordon Tarr and said this glass thing won't do [246] at all. You put a cover in here now, he says, I can't compare your detailing to detailing I have from other bids because glass gallons were not covered in the other bids.

Q. Mr. Minkler, you used the date of your original meeting with Mr. Hall as the 14th or 15th? A. Or 16th, I don't know when.

Q. For clarification purposes this was in September of '65? A. Oh, yes.

Mr. Mathias: I move Commissions Exhibit 56 A through X into evidence.

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Judge Hinkes: Is there objection?

Mr. McInerney: No, Your Honor.

Judge Hinkes: It is received.

(Commission Exhibit 56 A through X, previously marked for identification, was received in evidence.)

By Mr. Mathias:

Q. Now, what occurred after you received word from Mr. Schmidt that the glass gallons were not acceptable? A. We immediately took them out of the picture and spread the \$820,000 to the other items.

Q. This is the items that you had been previously negotiating with A & P on? A. That is right.

Q. I hand you now Commission Exhibit 62 A through Z and ask **【247】** you to familiarize yourself with this document, sir. A. Yes, I recognize it.

Q. What is this document, sir? A. This is the final quotation with the A & P savings spread to the private label items and to the various areas.

Q. Now, how was this final quotation tendered to A & P, sir? A. Gordon Tarr and I arranged to meet Elmer Schmidt out in his home village Libertyville. His wife had presented him with a new youngster and he was staying home for a few days, and we made a date to meet him at a VFW Hall, I guess he was an officer in it, anyhow, he had a key to it. We met there. We were the only ones there.

Q. And what occurred at this meeting, sir? A. I told him, apologized first for having put the glass gallons in the picture, but I told him that we had a mistaken impression that he might like that, and we are perfectly satisfied to take them out and that now the \$880,000 had been spread to the same items as in our previous quotation and I gave this to him. He looked it over and said, "Well, this certainly looks like that is the way it should be," and he said, "this

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is fine. I am very pleased. I will recommend to my superiors that we proceed on this basis, and I am very happy that I can do that."

Q. And what did you say to him on this occasion, Mr. Minkler? A. Well, I thanked him for being patient with us, but I said, [248] "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it".

Q. Now, Mr. Minkler, at that time that you made this statement to Mr. Schmidt did you ask him to save the competitive offers? A. Oh, I did. I certainly did. I said it is tremendously important that you save the quotations that you had from competitors. They will conceivably be extremely important sometime in the future, and he says, "They will be saved."

Q. Mr. Minkler, in connection with your earlier testimony you mentioned the amount of \$880,000, whereas previously all of your mentions had been to savings of \$820,000. Would you explain any apparent inconsistency here, sir? A. I don't know that I can offhand. I think that it is the way the volume worked out.

* * * *

[253] Judge Hinkes: Is there any objection?

Mr. McInerney: No objection.

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Judge Hinkes: 62-A through Z-2 is received.

(The documents referred to, heretofore marked for identification Commission's Exhibits 62-A through Z-2 were received in evidence.)

By Mr. Mathias:

Q. Mr. Minkler, I hand you Commission Exhibit 54-A and B for identification and ask you to familiarize yourself with this document. A. Well, this is again a computation, mathematic, by Joe Maloney.

Q. Have you seen this document before, Mr. Minkler? A. Oh, I believe I have but I don't recollect it specifically. I would have to study it.

Q. Mr. Minkler, I also hand you Commission Exhibit 55-A through E, which is two handwritten pages and a three-page typewritten transcription thereof, and ask you to read this document to see if it refreshes your memory as to the circumstances surrounding 54-A and B.

Mr. McInerney: The witness is being asked to read this for what purpose?

Mr. Mathias: To determine if it refreshes his memory concerning the preparation and meaning of Commission Exhibit 54-A and B.

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【293】 * * *

Q. Mr. Minkler, yesterday in questioning you concerning Commission Exhibit 62-B, there was some discussion concerning the total figure appearing on this page which is \$882,837.

Does the reading of Commission Exhibit 64-A and B refresh your memory as to the meaning of this figure? A. It clearly explains it.

Testimony of Ralph R. Minkler

Q. I see.

But you have no recollection other than the letter, itself?

A. Only in a general sense.

Mr. Mathias: Move Commission Exhibit 64-A and B into evidence.

Mr. McInerney: Our position is the same as before, Your Honor. We have no objection at this time.

Mr. White: Again I assume this is without the unidentified handwriting.

Judge Hinkes: Correct.

The exhibit is received.

(The paper referred to, heretofore marked for identification Commission's Exhibit 64-A and B, was received in evidence.)

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【330】 * * *

Q. What loss of dollar income are you referring to, Mr. Minkler? A. I am referring to the fact that we have just agreed to a reduction in price to A&P for private label.

Q. Sir, I call your attention to the fact that this is a letter dated December 28, 1964. A. Okay, it is still—all right. We hadn't got to the \$820,000 point as yet by a long ways, but we knew we were going to have to reduce our selling price on private label. It was going to cost us something.

Q. And you were telling Mr. Archer that there were also some savings that were anticipated? A. That is right.

Q. Was there ever a study made up until the time you made the final offer to A&P, or subsequently while you were at the Borden Company, as to what the actual cost was of supplying A&P private label from the Woodstock

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plant, to the best of your knowledge? A. No time and motion cost analysis, no. Projections, yes.

Q. As of what date? A. I can't tell you. During the period of these discussions, Joe Malone put data together.

Q. But not as a result of any experience with A&P from [331] Woodstock on private label? A. It was a projection.

Q. I am sorry? A. It had to be a projection, yes, sir.

Q. Thank you. Now, do you know of any studies based on actual experience? A. With reference to this?

Q. With reference to supplying A&P with private label milk from Woodstock plant. A. No.

Q. I believe you told Mr. Mathias that shortly after A&P had accepted Borden's private label quotation, you turned to the project of consolidating Borden's Chicago and Columbus divisions? A. That is right, sir.

Q. Now, when did that project first come under consideration at Borden? A. It came under consideration about November 1—now that, don't pin me down to the actual day, but about the time that we started delivering private label to A&P which was November 1, 2, 3 or 4, along in there, of 1965.

Q. And no consideration or discussions about it prior to that time, is that what you are telling us? A. That is right.

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[339] * * *

What would a difference of between seven and eight cents per hundredweight convert into on the basis of mills per half gallon according to that table which is 6-C, or 62-N? A. Per half gallon?

Q. Yes, sir. A. Seven cents is indicated as decimal point 003.

Q. And .8 cents? A. Decimal point 0034.

Testimony of Ralph R. Minkler

Q. So somewhere between three mills and 3.4 mills per half gallon, is that correct? A. That is right.

Q. Now, if A&P had asked Borden for 3.5 percent butterfat content milk, what would the additional cost to the A&P have been? A. The additional cost—

Q. Per half gallon. A. To A&P, per hundred pounds, would have been decimal point 0740.

Q. And per half gallon, sir? A. (No response.)

Q. Just give us the range. A. First we have a computation here on 6-B, of the change in cost when you move from a 3.5 to a 3.4 percent butterfat, and it is seven cents, four mills, per hundredweight now, divide [340] that by—

Q. Mr. Minkler, I think we can shorten it if you refer to the table on 6-C. A. All right. Again are we on half gallons?

Q. Yes, sir. It doesn't have to be precise. Is it between three mills and 3.4 mills per half gallon? A. Yes.

Q. Somewhere between those two figures? A. Yes.

Q. That there would have been, that would have been an increase in price if the butterfat content being supplied by Borden to A&P had been 3.5 instead of 3.4, is that correct? A. Yes.

Q. Thank you. Now, Mr. Mathias showed you a document that has been marked 16-B, and while they are getting that out, let me ask you is it true that A&P requested Borden to give it a private label quotation to be built up from the costs of raw milk, adding on costs for containers, processing, and delivery separately, as well as a profit, instead of merely giving an arbitrary differential from the price of Borden brand milk? A. No, I never said that it was, that they asked for it. If that is what I—I guess I don't understand your question.

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Testimony of Ralph R. Minkler

【354】 * * *

By Mr. McInerney:

Q. Do you have any idea what, if anything, A&P saved as a result of private label? A. No, I do not.

Q. You were shown by Mr. Mathias two exhibits which have been offered and received in evidence. One is 18-O, and the other is 21-U, and those are before you now? A. Yes, sir.

Q. I think you described both of these as sales tools used to try to convince the customer A&P that it was getting a good deal, is that correct? A. I believe so, sir.

Q. Now, the earliest of these is 18-O, dated May 25, 1965, and a later one is 21-U, which says "revised July 26, 1965." A. Yes.

Q. Do you know if there was any difference in the prices on which these two quotations were submitted? A. No, I don't know.

Q. Well, if there was a difference, would it have been a reduction rather than an increase as to the later document? A. Here is May, here is July, I just have to study it out.

Q. Well, I don't want to. The only way that I can do that for you quickly, Mr. Minkler, and I am trying not to take too much time up on this is to ask you to compare, for example, 18C 【355】 and 21C, that may help. A. 18C, all right, and 21C.

Both of them are based on a Class I price of \$4.32.

Q. Well, the prices on the exhibit which are marked 21C are either the same as or lower than the prices on 18C, would you say? A. For—now, just a minute. On 21C we have three-day, four-day, five-day, six-day delivery.

Q. Well, Mr. Minkler, let me pursue another line, because I don't want to take up too much time.

Testimony of Ralph R. Minkler

These documents, of course, have numbers in them that can be examined at a later time. A. O.K.

Q. Would you look at 180 and 21U? A. 180 and 21U, yes, sir.

Q. Now, in the column marked "Borden Gross Profit per Quart" on 180? A. Yes, sir.

Q. At the bottom of that column is a figure that appears to be nine-tenths of a mill? A. That's right.

Q. Now, in the half gallon column it appears to be six-tenths of a mill? A. Now, just let me find it. On the same? I haven't located it. Oh, yes, all right; the six-tenths of a mill.

【356】 Q. Yes. A. Right.

Q. Now, the comparable figures on 21U under "Borden Gross Profit per Quart" show one cent—no, I am sorry, 19 mills, do they not, under the "Borden Gross Profit per Quart," which compares to nine-tenths of a mill on 180, is that correct? A. That is correct.

Q. And on the half gallon, instead of six-tenths of a mill, the figure is two mills gross profit per quart? A. That is right.

Q. Now, can you tell us why the Borden gross profit per quart would have increased between May 25, 1965 and July 26, 1965?

Mr. Mathias: Your Honor, I object. I don't believe a proper foundation has been laid for this question. There is no showing that the figures are comparable in any way. I see many different figures on this sheet. They don't appear to be dealing with the same sales figures.

Mr. McInerney: You can argue about this later on, Mr. Mathias. I would like to not interfere with the witness' concentration.

Judge Hinkes: You may continue.

Testimony of Ralph R. Minkler

The Witness: I can't give you the reason for this off-hand. It isn't apparent to me.

By Mr. McInerney:

Q. Do the figures appear to be talking about comparable items, **[357]** that is, gross profit per quart in each case? A. Borden's gross profit per quart, Borden's gross profit per quart, yes, according to the headings.

Q. Now, how does that compare with the figure you referred to previously on that, the half gallon? These figures show six-tenths of a mill on the half gallon May 26, 1965, and two mills a half gallon on July 26, 1965. Do those figures appear to be comparable? A. They seem to be covering the same item, yes. That is all I can tell you.

Q. And yet in the later quotation it would appear that Borden is making more profits both on the half gallon and in total, is that correct? A. That appears to be right. And I can't tell you why.

Q. Can you tell us how this compares, or is it comparable at all, with the figure that you mentioned before about a half-cent a half gallon with respect to the quotation for the Chicago-Calumet area? A. I don't follow your question.

Q. Well, I think you told us before that looking at a quotation on or about February 9 that I believe was carried through to this period of time that we are talking about now that your anticipated gross profit per half gallon on that quotation was over a half a cent a half gallon. Do you recall saying that? A. No, I don't.

[358] Q. Now, the purpose of these schedules that we are looking at, 180 and 21U, were an attempt to convince A & P that they were getting a very low cost, isn't that correct? A. It is a sales tool, yes.

Q. Did A & P ever indicate to you or to anyone in your presence how much A & P expected to save in annual

Testimony of Ralph R. Minkler

savings or otherwise on private label milk? A. I don't recall any such statement.

Q. Was any such statement ever reported to you by Mr. Tarr or anyone else? A. I vaguely recall some general statement of a substantial amount, but I don't know what it was. I can't recall the circumstance of it, and I think it was from Gordon Tarr, but it wasn't significant enough to me so that it fixed itself in my mind.

Q. Mr. Minkler, at your deposition, at page 287 of the transcript I will just read that, because it is easier? A. Fine.

Q. And I hope by it to refresh your recollection.

"Q. Did A & P ever indicate how much they expected in annual savings from this arrangement," referring to the private label arrangement.

That was question by Mr. Mathias. And I said to the witness: "Personally." And you said, "Not to me." And Mr. Mathias continued:

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【367】 Mr. Mathias: Your Honor, I object to the statement being read into the record, if the witness cannot identify it.

Judge Hinkes: I don't think we can have anything taken in the record that has not been received in evidence.

This is a document which is totally unidentified.

Mr. McInerney: Well, again, Your Honor, Mr. Mathias did this on a number of occasions.

Judge Hinkes: I am not aware of that. And, if he did, it should have been objected to.

Mr. McInerney: Well, I didn't, in an effort to expedite things.

I will simply describe it as being the first four lines of Commission Exhibit for identification 44-B.

Testimony of Ralph R. Minkler

Judge Hinkes: Very well.

Mr. McInerney: Mr. Minkler, any time that you would like a recess, we will be happy to take one.

The Witness: All right. Go right on. Thank you.

By Mr. McInerney:

Q. Now, did you feel that it was necessary for Borden to actually meet any competitive offer A & P might have received? A. I am sure we would have to come close to it. Maybe we had a little leeway.

Q. Isn't it true that in giving your final quotation to A & P with respect to private label, that you felt that you did not actually have to meet any competitor's bid, but come fairly [368] close to it, and that would do it? A. Well, the statement that you are making is kind of contradictory.

Let me have the last part of it.

We have got to come fairly close to it. Maybe we have a little leeway, but we have got to be awfully close to a competitive bid.

Q. Now, why did you think that you could come in somewhat higher? A. Well, I place some value on the many years of excellent service, if you will pardon me, that the A & P had gotten from the Borden Company. They knew we gave them fine in-store attention, and we know they appreciated it.

Q. So that, in making your final offer, you did not believe that you were necessarily meeting the competitive bid, you might have come in somewhat higher, but, however you describe it, somewhat or some little leeway? A. That is the way I describe it; maybe we have got a little leeway, but we have got to come very close to meeting a competitive bid.

Q. And, of course, since it was part of your duties as an executive of Borden to obtain the best price you could from

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A & P, if you had any leeway you would like to exercise the leeway; isn't that so? A. Certainly, that is so.

【369】 Q. So, is it fair to say that when you did submit this so-called \$820,000 bid, you did not actually believe that you were meeting competition precisely, but were perhaps a little bit above the competitive offer? A. Oh, I wouldn't say that.

I mean, by that time that type of thinking was completely out of my head. Save the business; come in with a price they didn't turn down. We hoped we were meeting competition; we hoped we weren't going beyond meeting competition. That's the state of mind I was in when we got to the \$820,000.

Q. And you didn't feel that your bid was necessarily meeting the competition; it might have been above it or it might have been below it? A. I think I have already answered—I mean, maybe—I don't know any other way to put it. I felt we had to be very close to the competitive bid. I hoped we weren't going over. We had no way of knowing, but we were now coming in with a price that, well, I mean, we had—we were desperate.

Q. Let me put it this way: If there was going to be any error on one side or the other, which side did you want to be on? A. At that point,—I can't tell you. At that point, I was merely hoping we were meeting competition.

Maybe back there this point that you are making about taking advantage of some leeway because of relationship was 【370】 more pronounced in the early stages than it was in the latter stages. In the latter stages, we knew that we were in a very dangerous area, we had to get, hold this business.

Q. Well, now, at page 361 of your deposition, Mr. Minkler, starting at line 9, you were asked, "Now, in giving your final quotation to A&P, with respect to this private label business, isn't it true that you felt you did not

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actually have to meet any competitive quote, but only come close to it? In other words, that you had a little leeway with respect to the offer that you might make?"

And you answered, "That is the way both Gordon Tarr and I felt."

Question: "And why was that?"

Answer: "Well, we thought we had a history of a good enough relationship with the A&P customer that they would give us a slight advantage if it wasn't too big." Unquote.

Now, does that help you to recall your state of mind in giving your final quotation to A&P with respect to this private label business? A. I don't—with the exception of some rearrangement of the words, Mr. McInerney, I can't see that I have been saying anything much different from that. I mean, I have already told you that there was some space in here where certainly in the back of your mind you are hoping that you have a little leeway, so you read it back to me just now from—I don't [371] know—two years ago, five years ago, or what the hell it is.

Q. Well, this was in December of 1971, Mr. Minkler. A. Well, I think I remembered that pretty well, then.

Q. Now, are discounts, rebates, and other allowances to customers, generally public knowledge or published in the dairy business? A. A price schedule is; there is a printed price schedule, yes, that is generally circulated in the business.

Q. I am asking about whether, as a matter of general knowledge you would know what your competitors were charging chain store customers, for example. A. No.

Q. Is that kind of information rather difficult to come by? A. Yes, sir.

Testimony of Ralph R. Minkler

Q. And is it, in fact, a rather well-guarded business secret as to what the dairy is offering chain store customers, and, in particular, large chain store customers with respect to allowances, rebates, and so on? A. I believe that is a fair statement; yes, sir.

Q. And do the allowances vary as between customers from the same supplier? A. They might.

Q. Do they not, in fact, vary considerably? A. They might.

* * * * *

【377】 Mr. McInerney: Would you please repeat the question that I put to the witness before, Mr. Reporter, and I would like you to please concentrate on the question, sir, and give us an answer to it, if you can.

(The reporter again read the question.)

By Mr. McInerney:

Q. In other words, Mr. Minkler, when you gave that answer that I used the term "any how accounting", did you mean to imply by that that you had said that the \$820,000 bid of Borden was based on "any how accounting"? A. I had hoped not, but that isn't the way this read.

The "any how accounting" concept that I had in my mind through this period was that that is what we expected competitors to use.

Q. And, to the best of your resent recollection, did you ever tell anyone from A&P, or was anyone from A&P ever advised in your presence that Borden's quotation was based on "any how accounting"? A. To the best of my recollection, we did not tell them that our bid was based on "any how accounting".

Q. Thank you.

Testimony of Ralph R. Minkler

Now, did you or did anyone in your presence ever tell anyone from A&P that the \$820,000 quotation was not cost-justified? A. No; I did not.

【378】 Q. In your discussions with A&P people regarding private label, did you or did anyone in your presence ever mention the Robinson-Patman Act to Elmer Schmidt or to anyone at A&P? A. No.

Q. Is it fair to infer, then, that you did not discuss the legal niceties of the various Robinson-Patman Act defenses with anyone from A&P? A. Well, obviously when you say that a quotation is given to you, based upon a belief that we are meeting a competitive bid, you are certainly talking about a part of the Robinson-Patman Act. But you may not use the phrase, and I do not remember ever using the phrase "Robinson-Patman" in any of these discussions.

Q. Now, I believe you have testified that neither you nor anyone at Borden, as far as you know, ever made a formal cost study to determine what the actual cost would be of serving A&P from the Woodstock plant? A. No, sir; we did not.

Q. I think that you also said that you did not tell anybody from A&P that your offer was not cost-justified; is that correct? A. That is right.

Q. I believe also that in testifying yesterday you said that in talking to Elmer Schmidt on the occasion of submitting your final quotation to him, your recollection was that you 【379】 said to him that, this price is being given to you by us on the feeling and belief that we are meeting a competitive bid; we know of no other way to justify this.

Was that because you did not know, you did not have any cost justification at that point in time? A. No; I wouldn't say it was for that reason.

Q. Well, you did not know that it was not cost-justified? A. I did not know that it was not cost-justified because we hadn't made a cost-justification study.

Testimony of Ralph R. Minkler

Q. Thank you.

Now, did you make any sort of an investigation with respect to A&P's, the competitive bid that you understood A&P had? A. None whatever. I wouldn't know how.

Q. Well, has it happened that a customer will tell Borden, from time to time, that he can get his milk cheaper somewhere else? A. I am sure it has.

Q. And do you sometimes reduce your price in order to meet that competition? A. I can't answer that personally, because I haven't. But I have got suspicions.

Q. Well, what I am wondering about, and tell us if you are not qualified or experienced enough to answer it—I mean nothing insidious by that, Mr. Minkler; please believe me—【380】 whether you know, whether it is the general practice at Borden, to reduce prices to a customer on the basis that he says he has been offered a lower price, without verifying what that lower offer was? A. Well, now you said "general practice". This, I can't answer. But I will answer this way: That I am sure that on occasion when a customer has said to Gordon Tarr or to one of our representatives, "Look, I can buy milk from So-and-So, at a better price than I am buying it from you", and he produces evidence to prove it, and our man believes it, he comes in and talks to the sales manager, and there is a hassle on it, and there are, I am sure there are, occasions where the price is met, a record is made, and the price is met.

Q. And when you talked about evidence, did you refer to invoices? A. Oh, yes.

Q. Or the tickets, and that sort of thing? A. Yes; indeed.

Q. Now, did anyone from your knowledge ask A&P to produce any evidence with respect to the competitive bid that you spoke of? A. No one did, to my knowledge.

Q. Either before or after you had submitted the quotation to A&P? A. No one did at that time, to my knowledge.

Testimony of Ralph R. Minkler

【381】 Q. Did anyone from Borden, either before or after you submitted this final quotation, ask A&P for a letter or a statement in writing confirming that A&P had received a quotation from a competitor that was at least as low as the Borden offer? A. No; not to my knowledge.

Q. Did you or anyone from Borden at that time or thereafter inquire whether Borden's prices were lower than a competitor's prices or what the relationship might have been between Borden's quote and the competitive quote? A. Inquire of whom, sir?

Q. A&P or anyone else. A. Oh, no. Oh, no.

Q. Did you give any consideration to any course of conduct that would assure Borden that it was meeting but not beating the competitive bid? A. We—

I don't know whether your question is general and covers the whole area here.

All we had, as I have testified before, when I gave the final bid to Elmer Schmidt, he made the remark—well, not the final meeting at the VFW; I am talking about now first—when he first heard of \$820,000, he says, "Well, now you are in the ball park", words to the effect that, "This is where you belong"; "This might work out okay for you."

【382】 And then subsequently when we did finish this spreading of the 820,000 to the various items out at the VFW, when I said, "You know that we can only give you this price because we feel that we are meeting a competitive bid"; and I said "This is tremendously important, Elmer. You have got to preserve the quotations that you have, whatever they are. You have got to be sure your superiors understand this, and your lawyers understand it. If we are ever asked, we are going to say that we made this bid, this price, based on a belief that we were meeting competition."

And he said, "I read you loud and clear. I understand what you are saying."

Q. Well, I think you have said that already, Mr. Minkler.
A. Well.

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Q. My question is whether you gave any consideration to assurances with respect to whether you were meeting or beating a competitive offer, anything in addition to what you have already testified to. A. Well, we certainly sweat over it and talked about it in our shop, but no one knew how we could do it. There isn't any way that you can go to such a customer, or at least we didn't feel we could, and just blatantly say, "Look, show us; if you have got it, why, we will talk", but that wouldn't have served any purpose except to kick us out.

Q. Well, did you consider, for example, writing to A&P along [383] the lines you have just testified to? A. No; no; no.

Q. Did you consider asking them for a letter? A. No.

Q. Confirming that conversation? A. No; no.

Q. One of the documents that Commission counsel have marked for identification is a handwritten document, CX-55-G, that refers to a conversation with a Mr. Greaves and states, in part, "Don't worry about legal aspects until after we hold the business."

Judge Hinkes: You are referring to what document again, Mr. McInerney?

Mr. McInerney: 55-G.

Judge Hinkes: G?

Mr. McInerney: G; yes, sir.

By Mr. McInerney:

Q. Now, does that help to refresh your recollection at all as to whether any consideration was given to what might be done to assure you that Borden was meeting a competitive situation? A. No; it doesn't, Mr. McInerney.

Mr. White: Your Honor, I move to strike the question insofar as it brings into the record information from a document that is not in evidence.

Testimony of Ralph R. Minkler

Mr. McInerney: The document that the Commission **【384】** to introduce in evidence, and by the time it does, Your Honor, this witness may not be available, and I think—

Mr. White: I have no objection to showing it to him and asking him, but it is the same problem we had before as to whether the record is going to contain items—

Judge Hinkes: Yes; to refresh his recollection, he should be shown the document, and the record should not contain any items from a document not received in evidence.

Mr. McInerney: Well, Your Honor, when and if it is eventually received in evidence, I wouldn't be able to, unless we recall Mr. Minkler, and I don't want to do—

Judge Hinkes: Well, you simply ask the witness to take a look at the document and know where in the record it is. That is what should have been done, but the damage has already been done, so we will have to go on.

By Mr. McInerney:

Q. Who is Mr. Greaves, Mr. Minkler? A. He is the Borden attorney, the company attorney in the Chicago office.

He was. He is now retired.

Q. Did you receive advice from him with respect to this matter in early September or late August of 1965? A. I don't specifically remember. I know that there were occasions when I would talk to him.

Q. Well, prior to the submission of the final quotation to **【385】** A&P, were there such occasions? A. I am sure there were.

Q. And you discussed this matter with them prior to that time? A. Yes; I did.

Testimony of Ralph R. Minkler

Q. Now, I believe you have already told us that neither you nor anyone in your presence ever told A&P or anybody from A&P, rather, that the private label prices offered to A&P would not be made available to other purchasers; is that correct? A. That is correct.

Q. Now, would Borden, in fact, have sold private label milk to another customer, for example, Kroger, on the same terms and conditions that it offered private label milk to A&P? A. I believe we would; yes, sir.

Q. And, subsequent to this offer to A&P, did you, in fact, or did Borden, in fact, make private label offers to other customers? A. Not to my own personal knowledge.

Q. Would you have known if such offers had been made? A. Not noticeably.

Q. Now, at the time of your meeting with Mr. Elmer Schmidt, in September of '65, when you submitted this final quotation to A&P, did he ask you to verify in writing that these prices [386] would be made available to other customers of the same size? A. Not to my recollection; no, sir.

Q. Well, I would like to show you a portion of a copy of what has been marked as Commissioner Exhibit 63-C for identification, and I am showing the witness the fourth paragraph down, the middle of the paragraph.

I don't want to do any more than give you the first two words, so that everybody will know where we are talking about. It starts, "Letter indicate customers of same size", and would you read that sentence? A. Letter indicate—

Q. No; I'm sorry. I don't think anybody wants you to read aloud at this point. A. Oh, pardon.

Q. I would be happy for you to, but I think there might be some objection. A. All right.

I read it.

Q. Now, does that help to jog your memory with respect to any request of that nature from Mr. Schmidt or from A&P? A. No; it does not.

Testimony of Ralph R. Minkler

Q. Have you had occasion to see that kind of a letter passing between Borden and A&P at any time? A. I don't recall.

Q. I would like to show you something that has been marked **【387】** Commission Exhibit 68-A for identification, and ask you what that is, sir. A. It is a letter from Gordon Tarr to Elmer Schmidt of the A&P Tea Company.

Q. Do you recognize the signature? A. Yes; I do.

Mr. McInerney: I offer that in evidence.

Mr. Mathias: As whose exhibit, Your Honor?

Judge Hinkes: As presumably Respondent A&P Exhibit Number 2.

It has been marked for identification as a Commission Exhibit, but, of course, it isn't being offered by the Commission.

It will therefore have to be re-marked as Respondent's Exhibit A&P-2, identified as a letter from Mr. Tarr to Mr. Schmidt, and dated October 1, 1965.

(The document referred to, previously marked as a Commission exhibit, was re-marked as Respondent's Exhibit A&P-2 for identification.)

Mr. Mathias: Your Honor, I do have an objection. This witness has not been able to identify the exhibit. I do not believe there has been any ground work laid for its introduction into evidence.

Mr. McInerney: Your Honor, I think he has identified it. Mr. Mathias, himself, had it marked for identification **【388】** and I see no basis at all for the objection.

Mr. Mathias: Your Honor, marking is a far cry from introducing it.

Judge Hinkes: Well, the difficulty is this is a letter which has been identified as containing the sig-

Testimony of Ralph R. Minkler

nature of the sender, Mr. Tarr, but whether it was ever sent, let alone received by the addressee, we don't know, and its probative value would be nil if it was never sent.

Mr. McInerney: I would like Mr. Mathias to tell Your Honor whether he was questioning whether this was ever sent.

Mr. Mathias: Your Honor, it is not up to me to know whether it was ever sent. If Mr. McInerney is asking me to stipulate it into the record at this time, that is a different question.

Mr. McInerney: Well, what about that?

Mr. Mathias: And I refuse.

But the question is whether or not it has been properly identified.

Mr. McInerney: I think, Your Honor, we are taking a lot of time on—

Judge Hinkes: Well, in any event, I have to sustain the objection unless counsel are willing to stipulate its admission. Obviously, this document has not been identified as a document of any probative value inasmuch as it might [389] have been simply retained by Mr. Tarr and had never seen the light of day.

Mr. McInerney: I must except to Your Honor's ruling, but I am even more amazed that counsel for the Commission takes this position.

I will ask the reporter to mark what is presently marked A&P Exhibit 3-A and please mark that as A&P Exhibit, I believe it will be, 3, at this hearing.

(The document referred to was marked Respondent A&P Exhibit 3 for identification.)

Mr. McInerney: I would like to note for the record that what is now marked A&P Exhibit 2 for identifi-

Testimony of Ralph R. Minkler

cation and A&P Exhibit 3 for identification were both used at the deposition of this witness previously, and Commission counsel is well aware of them and their authenticity.

Judge Hinkes: Well, be that as it may, I think your complaint is to Commission counsel and there is nothing I can do about it.

Mr. McInerney: The problem is, Your Honor, I have been trying not to take up too much of Mr. Minkler's time; I have been doing my best to expedite his examination.

Judge Hinkes: I understand.

May I see your Exhibit 3, please?

Mr. McInerney: Yes, sir.

Mr. Mathias: Could we see Exhibit 3, please?

【390】 Mr. McInerney: It is the document that was marked as our Exhibit 3-A at Mr. Minkler's deposition, of which you have a copy.

Mr. Stone: Could we see a copy of it to compare them? I don't think we have a copy.

Judge Hinkes: Show it to them.

Mr. McInerney: I think you are familiar.

Judge Hinkes: Now, this last exhibit, Mr. McInerney, is a letter apparently signed by the witness. Perhaps you can establish its authenticity sufficiently here and now; I don't know.

Mr. McInerney: That is exactly what I was going to do, Your Honor.

By Mr. McInerney:

Q. Showing you now what has been marked Respondent A & P Exhibit 3, would you tell us what that is? A. A copy of a short letter from me to Jack Pentz.

Judge Hinkes: Dated?

Testimony of Ralph R. Minkler

The Witness: Dated October 1, 1965, signed by me.

By Mr. McInerney:

Q. And does Respondent A & P Exhibit 2—is that the enclosure to Respondent A & P Exhibit 3? A. It would certainly appear to be; yes.

Mr. McInerney: I offer those both in evidence, Your Honor.

【391】 Judge Hinkes: Did you send these letters to Mr. Pentz, Mr. Minkler?

The Witness: Well, I don't recall either of them at all. And, I'm sorry, but I do not. I have no recollection of them. But that's certainly my signature; I concede that.

Mr. Mathias: Your Honor, I see no basis for the introduction of Respondent A & P Exhibit 2, through their Exhibit 3-A. 3-A just states, here is a copy of the letter delivered to A & P this morning. It makes no description of the letter. The witness states no present recollection of the letter.

Judge Hinkes: No; the witness said it was.

Mr. Mathias: Of the letter, but not of the attached letter, the so-called attachment letter, A & P Exhibit 2. The witness has stated he has no recollection of the document, and the only thing he has identified is his signature on the letter to Mr. Pentz, A & P Exhibit 3.

Judge Hinkes: Mr. Minkler, do you remember signing this letter?

The Witness: No, sir.

Judge Hinkes: Do you remember it being prepared by anybody?

The Witness: No, sir.

Testimony of Ralph R. Minkler

Mr. McInerney: Your Honor, I don't think the test is whether he has a present recollection of signing the **【392】** document. I never imposed that test on anything that Mr. Mathias tried to offer in evidence.

Judge Hinkes: No; I wasn't testing his recollection of signing it as much as trying to ascertain that such a letter actually originated and went out; that is all.

Mr. McInerney: Your Honor, when this case is over, there will be no doubt about the bona fides and authenticity of that document. I am awfully amazed at this problem.

Mr. Mathias: Your Honor, a number of points have been called to my attention here.

I was not familiar with the one letter or the sourcee, and we have discovered some of these letters. It appears that the letter of October 1st, 1965, addressed to E. R. Schmidt and G. Tarr for G. Tarr's signature was mailed to Mr. Pentz on October 1, 1965.

We have copies of Borden file letters. We would not contest that A & P received a copy of the October—of the E. R. Schmidt letter, that is, Respondent A & P Exhibit 2.

Judge Hinkes: In which case?

Mr. Mathias: I do object to the form in which it is attempted to be introduced through a witness who has absolutely no knowledge concerning the document and has answered on several occasions that he does not. But we will stipulate that the document was received by A & P.

Judge Hinkes: Well, under the circumstances, I **【393】** shall receive these two exhibits of the Respondent A & P in evidence.

Testimony of Ralph R. Minkler

(The documents referred to, heretofore marked for identification as Respondent A & P Exhibits 2 and 3, were received in evidence.)

Mr. White: Your Honor, just as a matter of clarification, I assume that I should inquire as to what counts it is being received with respect to.

Judge Hinkes: Mr. McInerney.

Mr. McInerney: Well, I am not pressing any count against Borden at this time, Your Honor, in this forum. I think it goes to A & P's good faith on all three counts, as far as I am concerned. I am introducing it in defense of A & P.

Judge Hinkes: I think that is a sufficient answer for the purpose.

A & P is not a charging party in this case, and its only interest, legitimate interest, would be in defending charges against it. And, for that purpose, of course, it is being received, but having been received it is available for any purpose in this proceeding.

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【398】 * * *

The second letter, Respondent A & P Exhibit 3, is signed by you and it is addressed to Mr. Jack B. Pentz, President, Borden's Milk and Ice Cream Company, Division of the Borden Company, New York:

“Dear Jack:

“Here is a copy of the letter delivered to the A & P this morning.

“Cordially,

“Ralph.”

Testimony of Ralph R. Minkler

Now, do you have any recollection with respect to that letter? A. I am going to tell you. All of this could have been put together by Joe Malone. You denied me the opportunity to say that, but—

Q. I didn't deny you the opportunity. A. Well, I felt you did.

I can't recall these letters, but it wasn't an absolute impossibility at all, because it happened from time to time that Joe would write a letter and bring it to me to sign and it would go across my desk that quick.

Q. Thank you.

Do you recall anything else about these letters? A. No; I do not.

Q. Is there any way that we might refresh your recollection?

【399】 Can you think of anything that might help you to recall how these letters came into being? A. Well, I am very sorry; I wish I remembered these letters, but I don't.

Q. Well, letters of this nature, presumably from what you have said before, they would have been discussed among you and Mr. Malone and Mr. Tarr; is that correct? A. Well, certainly. We certainly discussed all the development of our prices together; yes. So,—

Q. Well, now, is there anyone else that you might have discussed a letter, such as either one of these, with? A. Joe Malone might have discussed that one letter with Joseph Greaves.

Q. He is the attorney? A. He is the attorney; yes, sir.

Q. Do you know whether he did or not? A. I do not; I do not.

Mr. McInerney: May we have a short recess?

Judge Hinkes: Yes.

Off the record.

(Discussion off the record.)

Testimony of Ralph R. Minkler

(A brief recess was taken.)

* * * * *

【403】 * * *

By Mr. McInerney:

Q. And do you know whether he had any experience as a milk buyer prior to these private label negotiations? A. Well, he was buyer before the private label, buyer for milk right in Chicago, before the private label discussions began. I don't know how long he was, but—

Q. Do you know whether he had ever had any negotiations for private label milk, for example? A. No, I do not. No, I don't.

Q. You don't know whether he did or he didn't? A. That is correct.

Q. Now, during the course of your deposition in 1971, toward the end of the year, December, at page 365 of the transcript, you were asked the question:

"Now, in 1965, was Mr. Schmidt also a knowledgeable and sophisticated buyer of milk and dairy products, in your opinion?"

Answer: "Not particularly."

Question: "Had he had much experience in this area?"

【404】 Answer: "No, he was rather new in that area." Unquote.

Now, appreciating that your memory may have been better than it is today— A. Well, that is not too inconsistent with what I have said, is it?

Q. Well, I am not arguing with you, Mr. Minkler. I am just trying to get at what the facts are. A. Oh, excuse me.

Q. Does that help to jar your memory at all as to what knowledge and sophistication Mr. Schmidt had in 1965, in

Testimony of Ralph R. Minkler

the area of purchasing milk? A. Beyond what I have already said, I am getting a little lost. Certainly by 1965 he knew, he was beginning to get pretty sophisticated, I would think, by the time we got to the end of the bidding on private label business. And as I have already said, that in an earlier period of time I think that Gordon Tarr did a lot to establish his friendship over there by helping, I guess educate is the word, Elmer, into some of the complications of the milk business.

Q. Do you know if Elmer had any other tutors? A. No, I do not.

Q. Mr. Minkler, you have testified with respect to these negotiations on two prior occasions, as I recall. One is the deposition that we have been referring to, which was on December 1st or 2nd, of 1971, and the other occasion was in * * *

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Testimony of Gordon Tarr

June 19-20, 1973

【842】 * * *

J. GORDON TARR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Judge Hinkes: Would you state your full name, please?

The Witness: James Gordon Tarr.

Direct Examination by Mr. Mathias:

Q. Tarr is spelled? A. T-a-r-r-.

Q. What is your present address, Mr. Tarr? A. 59 West Burton Place, Chicago, Illinois.

Q. Are you appearing today in response to a Commission subpoena, sir? A. That is right.

Q. What is your age, sir? A. 72.

Q. Are you presently employed, sir? A. No, I am retired.

Q. In what year did you retire, sir? A. 1968, September 1.

Q. With whom were you employed immediately prior to your retirement? A. The Borden Company, Inc., now.

* * * * *

【851】 It was what we called area No. 1. It comprised 70 percent of all the business that we did with A & P, all the milk business that we did with A & P.

Q. Would the Calumet area include Gary, Hammond, East Chicago? A. That is right. That was all part of that Federal Marketing Order.

Q. Did you assist in the preparation of the price quotation that was made to A & P in February? A. I did not.

Q. But you did deliver it to A & P? A. That is correct.

Q. Who was present when you delivered it? A. So far as I know, just Mr. Schmidt.

Testimony of Gordon Tarr

Q. Did anyone else accompany you from the Borden Company? A. I don't think so.

Mr. Mathias: Your Honor, I want to show the witness an exhibit in evidence. We do not have all of the exhibits back yet from the marking procedure. I do have a copy of CX-14-A-E. I wonder if Respondents have any objection to my showing him a copy of this exhibit.

Mr. McInerney: No.

Mr. White: No.

By Mr. Mathias:

Q. Mr. Tarr, I show you a document which has been received [852] into evidence as Commission Exhibit 14-A through E, which is dated February 9, 1965, and ask you to briefly review this document. A. This document is the one to which I just had reference.

Q. This is the document you delivered to Mr. Schmidt? A. This is the document I delivered on or about February 9 to Mr. Schmidt, and as you will see, it was for the Chicago and suburban areas.

Q. What did Mr. Schmidt have to say about the February 9 offer? A. At that time, he accepted the whole thing as okay.

Q. Prior to going to see Mr. Schmidt with the February 9 offer, did you hold any internal discussions with Borden management concerning the approach that you were to take with Mr. Schmidt? A. Not that I can remember.

Q. Was there any reason, Mr. Tarr, why this February 9 offer was limited to the Chicago-Calumet area, or Area 1, as you referred to it? A. There were many reasons. One of the principal reasons was when you got the outside area, the other 30 percent was divided up under many different orders. It had prices that were, generally speaking, lower than anything we had in Chicago way. It would

Testimony of Gordon Tarr

be quite difficult, as I explained to Mr. Schmidt, and was when we went into it, and finally arrived at it, it was * * *

* * * * *

【863】 * * *

Q. Is there anything else at all that you can recall about this particular meeting, that is, the one in which Malone accompanied you in 1965? A. No, so far as I know, that was about it.

Q. Following this meeting, did you and Mr. Malone report to Borden management? A. I think Mr. Malone did.

Q. Were there any internal conferences or discussions concerning the status of the private A & P label matter? A. I wouldn't know if there were discussions or not with the Board of Directors, but so far as I can remember, I don't remember anything, particularly over at our place where it was discussed.

Q. From February to late 1965, did you have frequent meetings with Mr. Minkler, Mr. Malone and others, in management group concerning the private A & P label business? A. No, not unless something was changed. That was the only time I was brought in.

Q. What was the effect, that you can recall, in connection with the Borden-A & P negotiations following this May 1965 meeting? 【864】 A. I know in the latter part of July, I went over there with a quote that included on outside points, a differential in cost, different costs, and a different uniform cost based on their deliveries which would apply to the private label.

Of course what might have happened was that prior to that, Mr. Schmidt asked me about it. I don't recall exactly how it came up.

Q. Would this be in area No. 1? A. No, because with this solid union, they had here, it would be impossible to make break, but on the outside, we gave them quote we would move toward these things as rapidly as we could.

Testimony of Gordon Tarr

You couldn't do it in Rockford, but you could do it in the outer suburban area.

You could do it in Ottawa, La Salle, and many places. So some places, you could not go further than five days, but we were working down toward three all the time. Somewhat would have the ultimate which was three days, so it was not the amount of saving, but a stepping stone from five to four to three, so that one man could cover two existing routes on that basis.

Q. What relation did this have to July, 1965 offer? A. That is what the offer was. The offer was a pricing on private level, a quote, we were still not dealing them any, we did have it existing at that time in an area where we do even put it in on the Borden label. Mr. Schmidt, he wanted that much off, which was a saving and justifiably so, on the [865] three different days.

Q. Who prepared the offer in the delivery of late 1965, did you assist in the preparation of it? A. I developed it. It was my job to develop the differential in the three, four, five days. I don't know if Mr. Malone did or I did, but I am quite sure I had a hand in it.

Q. Mr. Tarr, how was this quotation in late July—first, was it delivered to A & P? A. Yes.

Q. Do you recall who you delivered it to, sir? A. Mr. Schmidt.

Q. This is the same Elmer Schmidt we have been discussing all the time? A. That is right. He was the head buyer of dairy product for A & P.

Q. Did you ever have any dealings with anyone at A & P, other than Elmer Schmidt? A. If Elmer was not there, I would see Bob Hall. This was not on big questions. Hall was Elmer's assistant and I would talk to Bob at times.

Q. Did you ever have any dealings with Mr. Schmidt's superior? A. Do you mean the Divisional Man, Bartels, for instance?

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Testimony of Gordon Tarr

【871】 *By Mr. Mathias:*

Q. I would like to show you Commission Exhibit 37 A and ask you if this document refreshes your memory as to the amount of savings stated to Mr. Schmidt at this August 13 meeting? A. This is exactly what I mean when I said I was not quite sure it was up to the 410 or was in the 300-something. It was before that that it was 300-something. This was in writing.

Q. Is your mind now refreshed as to the amount of savings in August? A. Yes, 410.

Q. On August 13, the amount calculated was \$410,000 and some for savings for Mr. Schmidt? A. That is correct.

Q. Do you recall anything else concerning the discussion between you and Mr. Schmidt at this August 13 meeting? A. Not offhand I can't remember anything.

Q. What occurred next in your dealings with A & P? A. I think about a week after that I was over to A & P and we talked about various things. Elmer said, "By the way, we have asked for bids from other dairies just to make sure you are right in this thing, and we felt it was better to get outside bids to make sure everything was correct on your costs and so on."

Q. What did you say to Mr. Schmidt at this point, sir? A. In the first place, I was surprised because I understood 【872】 and was told it was not going to be put out for competitive bids because then everybody would know about A & P going into private label, and I did not think anybody would bid lower than we bid anyway. I was quite disappointed and a little shocked that he had asked for bids and I told him so.

Q. What else did you say to Mr. Schmidt? A. I can't remember, but it was along that line.

Testimony of Gordon Tarr

Q. Did you mention any fear concerning the results of requesting competitive bids? A. I don't know at that time. I know at other times I had told Elmer some people would like to get this business pretty badly and they might bid under any reasonable figure to get it hoping they would be able to make it up later since it was a new business for them and it was the entire business for us. I don't know if that was the particular time but that was mentioned in the course of things.

Q. Did Mr. Schmidt indicate what other dairies had been contacted for bids? A. Not in so many words. He did mention some names along in the course of things, but he did not actually say these are the ones that were asked for bids or anything, but he did mention the names of a couple of dairies.

Q. What dairies were named? A. He mentioned Bowman's.

Q. When you did mention your fear to Mr. Schmidt concerning [873] the possibilities that other dairies would underbid Borden at an unreasonable price just to obtain the business, what did Mr. Schmidt say to you? A. It seems to me he said something like, "We understand these things and we would recognize if someone came in with something like that—we would certainly recognize it as such. You don't have to worry about anything like that. If anybody comes in with anything that is crazy, we would know it."

Q. Was there any other discussion at this meeting in which he mentioned that the matter was to be put out for bid? A. I can't recall anything else.

Q. Who was present at that meeting? A. I am quite sure it was just Mr. Schmidt and myself.

Q. What occurred next in your negotiations with A & P? A. I may not have these things in proper sequence, but I

Testimony of Gordon Tarr

will try to develop them along that way. It seemed to me around September 1—I know this happened—that Elmer called me on the telephone on a late afternoon—I don't remember what day of the week it was—he was very agitated. He said, "I have a bid in my pocket. You people are so far out of line it is not even funny. You are not even in the ball park." This was on the telephone. He was on his way home at the time he called me. He said, "This is really terrible. I am shocked at the big Borden Company and the relationship we have. I have a bid right here in my pocket."

【874】 He said, "This bid is so far different from yours that there isn't any comparison."

He said, "Suppose you see me the first thing in the morning."

I said, "I will be glad to."

I went over to A & P the next morning. In fact I told my people what he said immediately. The next morning I went over to see Elmer and he said, "Look, this is terrible. I don't understand it at all. You are nowhere near in the thing."

I said, "You know all the things we do for you. We have promotions, and this and that and we have manpower out in the field. I told you there would be some bids that might come in that might be screwy, and I don't see how anybody can sell any cheaper than us. I can't figure the deal out, but certainly they can't be doing what we are doing."

He said, "If the promotions you are giving us are costing \$50,000 that would not be a drop in the pocket between your bid and the other man's bid."

I said I couldn't understand and I told him I would go back and talk to my people, which I did.

Q. How long was this discussion in Mr. Schmidt's office. Were you in his office for a long time? A. I don't think

Testimony of Gordon Tarr

it was a long time. It was not like the time Joe Malone was there. It was brief and to the point.

Q. Did you attempt to obtain any information as to the [875] character of the competitive offer Mr. Schmidt had? A. There was no sense in that because he said he couldn't tell me what it was, and I knew he couldn't and wouldn't. Always in a case like that I would try to feel around a little bit and I think I did in this instance. I don't remember what I said or what I asked, but I did feel around a little bit.

Q. Did you keep the conversation going for a while? A. A little bit, I guess. In the course of it he said he couldn't tell me and I told him I was not asking him who. I was just trying to get some idea because I couldn't understand it anyway. The only thing I got for a suggestion was \$50,000 would not amount to anything, that it would be a puffer compared to the total amount. That is all I knew for that particular time.

Q. Was there any mention as to whether or not there was one bid or more than one bid? A. At that time he said "A bid in my pocket."

Q. Was there any indication as to who the competitive bidder was? A. No. There wasn't anything said as to who it was. I don't think I tried to find that out. I tried to see if I could get some basis of figuring the thing out. That is all.

Q. What happened next? Did you go back and report this to your management? A. Immediately.

[876] Q. This is to the management of Borden? A. Yes.

Q. And that would include Mr. Minkler and Mr. Malone? A. That is right.

Q. What occurred next? A. I guess they went to work on trying to see what they could work out of this thing without anything like manpower and product guarantees

Testimony of Gordon Tarr

and any of these kinds of things. All the guarantee then would be that milk would be in good shape when it was delivered. After that, it was their property and all the things we could possibly make any savings on, but I did not work these things out.

Q. You did not participate? A. I did not participate. I believe Joe Malone and others did.

Q. Did you participate in any of the conferences leading to a new quotation? A. Only when they arrived at what they thought they were going to do, and prior to the time when I came back from A & P and mentioned it, I think they called a special meeting and I had attended that.

Q. Did Borden then prepare a new offer? A. They did.

Q. What happened next? A. I think it was about a week later I made an appointment for [877] Mr. Minkler and myself to meet with Elmer Schmidt. When I went over there Elmer reiterated all the conversation almost verbatim that he had with me, that it wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding high, and all the whole thing.

At that meeting Mr. Minkler had prepared a statement on the amount but it had not actually been divided up by products or how we were going to do it, but this was calculated on what Mr. Minkler called anyhow accounting.

Q. What was that? A. It was a new type of term that described a company feeling this was extra business for them and, therefore, they would not put any overhead on to the product, hoping that perhaps later they could and would go the limit that they could possibly go on "anyhow accounting"—in other words, eliminating the normal procedure in accounting of charging overhead and all these other things to the product. We came up with a figure just double what this \$410 was—\$820,000. This would eliminate all services, all manpower, all these things that

Testimony of Gordon Tarr

we were doing. It would be a drop delivery. The drivers would not put the product away. They would not put it at the dairy. They would leave it at either the back door or at the back of the cooler, and there would be an advanced order system that would go into effect so we would know what to prepare for A & P for [878] the next day and the orders could not be changed until the next afternoon and all overhead was eliminated, too, I believe in the calculations. This was what he called anyhow accounting—anyhow they wanted it.

Q. In the discussion between Mr. Minkler and Mr. Schmidt, what did Mr. Minkler say about this \$820,000 figure? A. He described it as "anyhow accounting". He said, "You know, we are pioneering this, and we pioneered this three, four, five day thing, and we have tried to do everything to get dairy prices down lower for you and everybody in the business." He said we had been doing things for him that we could not continue to do and we could only guarantee that it is a good product, in good saleable condition, and beyond that it is your product.

Q. So Mr. Minkler did mention the term anyhow accounting to Mr. Schmidt? A. Yes, he described it entirely to him and to me too.

Q. What did Mr. Schmidt have to say concerning this new quotation? A. He said, "Now you are in the ball park."

Q. Was anything more said between Mr. Minkler and Mr. Schmidt at this meeting? A. He said, "Please give me in writing all these things you cannot do now which you did."

Q. What about the individual product prices? [879] A. We would have to work this out and we would get back to him with the prices.

Q. At this meeting, this \$820,000 saving was the entire quotation, is that correct? A. That is right. Was a quote that the differential would come out to \$820,000.

Testimony of Gordon Tarr

Q. Then this had to be spread throughout the product line? A. That is correct.

Q. Was Mr. Schmidt aware of this fact? A. Yes.

Q. Did he make any statements concerning the spread of the price to the product line? A. He said we were in the ball park.

Mr. McInerney: I object.

Judge Hinkes: Strike the answer.

Rephrase your question.

By Mr. Mathias:

Q. What else was discussed by Mr. Minkler and Mr. Schmidt at this conference? A. There were quite a few things talked about. Offhand, I can't remember just what any of the other things were. These were the important things in relation to the quotes.

Mr. McInerney: I would like to move to strike the question and answer which had to do with whether Mr. Schmidt was aware of something. As far as I recall, there was no [880] basis for that in testimony as to what was said and done. In any event I think it was an improper question.

Mr. Mathias: Your Honor, this witness was present at the meeting. The prior question to that had elicited the information that at this point the quotation or offer by Borden was strictly for an \$820,-000 saving figure and that this had not been spread through the product line. I merely asked the witness if Mr. Schmidt was aware of this fact.

Judge Hinkes: The witness answered Mr. Schmidt was aware, but can you tell me how do you know Mr. Schmidt was aware?

The Witness: He had been told it was the amount, and we had not developed it. We will develop it.

Testimony of Gordon Tarr

By Mr. Mathias:

Q. What occurred next, following this meeting of early September, 1965? What was the next development in the dealings between Borden and A & P? A. I think the next thing was Elmer told me he was going to take a vacation just a couple of days afterwards. His wife was going to have a baby and he was going to take his vacation at that time. He was not going to leave Libertyville and anything we had to report we could call him up at our house and he would direct what we would do with it. He said, "Get busy with this breakdown because we are losing money every day until you come up with this quote. We want to buy private [881] label and Borden possibly rather than straight Borden."

Q. Did Borden compute out an offer spreading this \$820,000 to the product line? A. Yes, but there was something else in between that.

Q. What was that, sir? A. Elmer Schmidt had always wanted to have glass gallons in the private label line. We felt it was rather impossible in our operation to put a private label gallon jug which would have to be sorted out, come back to us and sorted out and kept separate and operate the thing correctly with the number of A & P bottles as well as ours. It would be an awful mess. We felt it would be impossible to work the thing under the present situation.

However, during all that time there were some thoughts being given to it. Production was being asked about it and others. It was finally decided that we could put out a gallon glass with an unlabeled bottle having an insignia on the bottom. It would not say Borden, but an insignia so we would know it is our bottle and take it back and have one cap for Borden's and put everything on the cap, and another cap for the A & P and still use the same bottles, and this could work out maybe, and we could develop something like that.

Testimony of Gordon Tarr

Q. Why would Borden want to include the bottles in their quotation?

Mr. White: I object to the form of the question.
There is no basis for that.

【882】 The Witness: Elmer wanted it.

By Mr. Mathias:

Q. Was there any advantage to Borden to include the glass? A. Elmer thought there was afterwards, but we did not think it that way. We thought Elmer wanted it that way and we were developing an overall plan for the \$820,000.

So, anyway, shortly after Elmer had gone on vacation, I called Elmer and asked him what he thought about having glass gallons included in the quote and he felt—his first reaction to this was it should be glass private label, and I felt we could work it out on the basis of a plain glass gallon that would have the difference on the cap between Borden and A & P. Elmer thought that was a good idea. He said no private label program could be complete without having glass gallons. It had been what he had been talking about for a long, long time, so he thought that was fine at that point.

Q. How did the price on the glass gallons compare with paper gallons? A. Cheaper, at least with Borden.

Q. Why was that? A. Because glass has maybe 25 times use and while it costs somewhat more than paper, the paper gallon costs more than two half-gallon paper cartons so, you see, there is no saving in paper gallons actually. It is something stores sell less. There is even a little greater cost for the dairies. So, if 【883】 we are trying to get something that is cheap, paper gallons could not compare with glass gallons.

Q. Were the glass gallon jugs included then in a quotation to the A & P? A. They were.

Testimony of Gordon Tarr

Q. Was this quotation delivered to A & P? A. Yes, it was delivered to Bob Hall. I called Elmer and told him we had the quotation all ready. We found out about the glass gallons then and the glass gallons was in the quotation. I talked to Elmer and he said give it to Bob Hall, which we did. Mr. Minkler went over with me and we delivered it to Bob Hall who asked a few questions but nothing of any import and nothing that I can remember exactly. He asked questions about different things and accepted the quote.

Q. Was anyone present at this meeting besides you and Mr. Minkler and Bob Hall? A. No. We went to a private office there.

Q. Was there any discussion at this meeting that you can recall? A. Nothing, except I said there was nothing important. I can't remember anything that was said actually but there wasn't anything important.

Q. What occurred next following this meeting with Mr. Hall? A. Elmer got on the phone and he was very excited again. He said, "You are pulling a fast one here. You are putting [884] glass gallons in here as part of the \$820,000."

I said to Elmer, "I checked this with you and it was part of the program."

He said, "It is not fair to the other bidders." He said, "They were given figures on all these items and they did not bid on glass gallons."

I said, "I thought you want it, but if you don't want it we will take it out and figure it just on these other things. I thought you wanted glass gallons and that you were after a certain figure."

So that is what we did.

Q. Was this in a telephone call that Mr. Schmidt gave you this information? A. There was one time and this may have been it when he came down from Libertyville and met with us or met with me—I can't remember.

Testimony of Gordon Tarr

Q. But you were involved in this communication from Mr. Schmidt? A. Yes, it was a telephone call to me. I know on one occasion he came down from Libertyville, and I don't recall if this was the time or not.

Q. What occurred after this communication from Mr. Schmidt? A. We changed the quote and left out the paper gallons and developed the things along the lines—

Q. You stated paper gallons, did you mean the glass gallons? 【885】 A. Yes, we left the glass gallons out and then sometime right about that time Elmer said to me, "Look, sharpen your pencil a little bit because you are not quite there," meaning what the other party was bidding, I guess. So, as we developed the new one I think it came out a little higher because we found some products we could give a little better deal on and we did.

Q. Was this next quotation delivered to A & P? A. That was the final quotation and it was delivered to Elmer —by that time his wife was in the hospital and the baby was not born yet and he did not dare leave town, but he wanted to see us and see the whole thing. I guess he was some officer in the Veterans of Foreign Wars up there in Libertyville, so he opened up the club for the three of us and we sat there and discussed the whole thing in great length.

Q. Who was present at this meeting? A. Mr. Minkler, Mr. Elmer Schmidt, and Mr. Tarr.

Q. What was said at this meeting by Mr. Minkler? A. He explained the whole thing to Elmer. He explained how the thing worked. It was a very smooth quote in that you could take any area and take the marketing price, and you could compare that with the marketing price of another area and the different price and you would find that the differential was exactly what that difference in cost was. If the first market went up to the second market, it would be still as the second 【886】 market, if the paying price

Testimony of Gordon Tarr

went up. This was a beautifully worked out thing that was foolproof. Here was the whole thing and just what he asked for and he liked it.

Q. What did Mr. Minkler say to Mr. Schmidt, if anything, at this meeting? A. He said many things. We talked about many things there but I can't remember all the things that were talked about, but I can remember the end of it.

Q. What was that, sir? A. At the last of it Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said, "Yes."

He said, "Now, I want you to be sure to save the bids in a safe place."

He said, "They are being saved, and I know what you mean. The Legal Department has them at the moment and the Legal Department will probably keep them."

He said, "I understand you, I read you loud and clear", or something like that.

He said, "I think this quote will be very acceptable to our people. I don't think there is any reason to presume that you won't be serving us very shortly with the account."

* * * * *

【894】 * * *

did Borden begin to sell private label milk and dairy products to A & P in the Chicago area under the terms of the quotation delivered to A & P in late September in Libertyville? A. No, not in late September.

Q. I will strike the question.

You have referred to the quotation delivered in Libertyville as your final quotation to A & P, is that correct, sir? A. That is correct.

Q. Subsequent to this time did Borden begin to sell

Testimony of Gordon Tarr

private label product to A & P under the terms of this quotation in the Chicago market area? A. Subsequently, yes, at about November 1, which is subsequent I guess.

Q. So sales of the private label to A & P began on or about November 1? A. Yes.

Q. That is 1965, sir? A. 1965 still.

Mr. Mathias: Your Honor, I think we are at a good breaking point. I don't think we have much more examination of this witness in the morning. It might be a good idea—I would like to shorten the day tomorrow as much as possible for Mr. Tarr and possibly we could start at 9:30.

Mr. White: It is all right with me.

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【910】 * * *

Q. Were you familiar with those records, the form sheet? A. To some extent, yes. I didn't use them.

Q. I hand you Commission Exhibit 121 for identification and ask you if you can identify this document, sir? A. Yes, sir.

Q. And what is this document, sir? A. This is, as I just mentioned, the type of price sheet that was given out to every customer outside of the chains.

Mr. Mathias: Move CX-121 into evidence.

(The document referred to, heretofore marked for identification Commission's Exhibit 121, was received in evidence.)

Mr. McInerney: Your Honor, this is a document that was never sent to A&P according to the witness' testimony and I am not sure. I don't think it is relevant to anything here.

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The Witness: It was a list price.

Mr. Mathias: Your Honor, this was a published list price, as the witness stated, that was sent to their other customers and shows part of the basis for pricing to other customers. In this instance the sheet identifies itself as the Hammond areas, which is one of the areas in consideration in our complaint.

【911】 Mr. McInerney: I think it is clear and if it isn't, I would like to ask the witness a question on voir dire.

Judge Hinkes: You may do so.

Voir Dire by Mr. McInerney:

Q. Mr. Tarr, did you ever give a document similar to this one to A&P? A. No.

Q. And is it fair to infer that you never gave this document to A&P? A. No. As far as I know, I didn't.

Q. Well, can you tell us looking at the document that you have in front of you whether you ever gave that document to A&P? A. As far as I know, I never did.

Q. Well, this apparently has to do with the Hammond region if you have anything to do with the Hammond region? A. Yes, it was part of the Chicago operation, our Chicago branch operation.

Q. Insofar as that region was involved with chains to whom you were selling, is that correct? A. Well, this was given not to chains. It was given to other eastern chains. There was a discount schedule attached to that you see.

Mr. McInerney: Thank you.

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【935】 * * *

Q. Now, once Borden commenced supplying private label milk products to A & P did that include service to any

Testimony of Gordon Tarr

A & P stores in the State of Iowa? A. No, sir. We never sold private label in Iowa.

Q. Yesterday you discussed an occurrence where you delivered a price quotation to Mr. Bob Hall of A & P. Do you recall this? A. Yes, sir.

Q. And I think, Mr. Tarr, you said that Mr. Hall accepted the quote. Did you mean that he merely received it or this he told you that it was acceptable? A. No, he merely received it. I used the wrong terminology.

Q. Mr. Tarr, at any time during the private label negotiations about which you have testified or subsequent thereto, did you discuss with any representative of A & P or did anyone else discuss in your presence with any representative of A & P price at which A & P would or intended to sell private label milk out of the store? A. No, sir. I Emphatically no.

* * * * *

【1955】 * * *

Q. Isn't it true that you tried to persuade Mr. Schmidt that other dairies might not give him reliable prices in the sense that they might come in with a low price originally and then try to jack up the price later on? A. Well, I told Mr. Schmidt. I wasn't trying to persuade him of anything, but I told him that somebody might bid on this thing on a basis of trying to get the business at any cost and it wouldn't be a realistic bid based on their cost but hopefully if they got the business they could sometime later on perhaps get the thing into a profitable way and this has been done many times in business dealings and I did tell him that, and he said he would recognize that if that was what it was. He knew those things existed and he recognized it. So I didn't try to discourage him from putting the thing out because he already had put it out for bids so he said.

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Q. Now, when you learned that an A & P had received a lower quotation were you and Mr. Minkler somewhat embarrassed about that fact? A. Yes.

Q. And did you discuss how you would explain to A & P that they had received a quotation which apparently was greatly at variance with the one that you had submitted? A. I don't remember that we discussed it. * * *

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【962】 * * *

Q. So he didn't use the term anyhow accounting with reference to the Borden quotation, that being based on anyhow accounting? A. That is right.

Q. Now, wasn't it a normal business practice in the dairy industry to meet competitive prices? A. Yes.

Q. And you did that not just with respect to any offer that you might make to A & P but with all of your customers, isn't that correct? A. Yes.

Q. And did it happen from time to time or fairly frequently that a customer would say that they could get a better price elsewhere and you would meet that price? A. Not necessarily. We could elect whether we wanted to or not.

Q. But when that did happen though, did you ask the customer for some— A. Proof.

Q. Proof in what form? A. Well I suppose an invoice. You see, none of that applied to me. I am just speaking about what was done in the wholesale 【963】 division and I know it was done. They didn't meet all competition.

Q. But when they did— A. When they did they wanted proof usually.

Q. What kind of proof? A. Either an invoice or a bill that they had. Usually milk is sold to most people on the basis of cash and they'd have a cash sales ticket that would cite that. But I don't think we met it in the majority of cases even with single accounts because a lot of funny

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things were going on and you couldn't believe a lot of the things that the grocer would tell you.

Q. But whenever you did do it you made sure that you were actually meeting the competitive price by getting some documentary evidence? A. I should presume our wholesale department did that, yes. I didn't do it myself because I didn't have those accounts.

Q. Now, did you ever, either before or after you submitted Borden's final quotation to Elmer Schmidt, did you ask him or anyone from A & P how Borden's bid compared with the competitive offer? A. No.

Q. Did you ask the identity of the competitive offerer? A. Not in so many words, no.

【964】 Q. You tried to find out indirectly, is that it? A. Yes.

Q. Now, I think you have testified that you not only did not ask Mr. Schmidt about how your bid compared with the competitive bid, but that he never volunteered that information, is that correct? A. Well, only in the manner in which I have testified.

One time he said, "You are not in the ball park. You are way off." And 50,000 wouldn't make it.

Q. I will come to that. A. And all these other kind of things which would give you some inkling perhaps of what was going on.

Q. But that \$50,000 remark was the only clew you had? A. Well, no. There were others. Particularly towards the end when he said "Sharpen your pencil a little bit."

Q. I am going to come to that.

Now, you didn't answer the question, however, that I had previously posed and I would like if his Honor would please instruct the witness to try and be responsive to the question asked. I would like the question repeated.

Mr. White: I think the answer was responsive. If your Honor is going to be asked to rule on it.

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Judge Hinkes: Let's hear the question and answer.

(The record was read by the reporter.)

Mr. McInerney: I think that is the kind of [965] question that can be answered yes or no.

By Mr. McInerney:

Q. May I put that question to you again, Mr. Tarr, as to whether Mr. Schmidt ever volunteered to you what the competitive offer was? A. No.

Q. Now, you did try to get a clew from him as to what the competitive offer was, is that correct? A. Yes.

Q. Did he ever in any way suggest to you what the Borden quotation should be? A. No.

Q. In any way at all? A. Well, only by inference, as I testified before. But if the answer is yes and no, inference isn't the whole thing and I will say no he didn't.

Q. Well, now, let me read to you from your deposition of December 2, 1971.

Mr. Mathias: What page please?

Mr. McInerney: 511, it commences toward the end of page 511 and goes through the top of page 513.

"Question: Now when you made this final quotation—and when I speak of final quotation I mean it is \$120,000 saving over—prior to your making that offer did Mr. Schmidt in any way suggest to you what your quotation [966] should be?

"Answer: No.

"Question: When you gave that final quotation to Mr. Schmidt at that time or thereafter did he tell you that you had actually met the competitor's price?

"Answer: No. He never said that."

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Mr. Mathias: Your Honor, I would object. I think the quotation reads exactly, "Not—no, he never said that."

Mr. McInerney: That is right, Mr. Mathias.

Judge Hinkes: Very well.

Mr. McInerney: "Question: Did you ask Mr. Schmidt what the competitive offer was?"

"Answer: No.

"Question: And did he volunteer that information to you?"

"Answer: No, never.

"Question: You never received that information?"

"Answer: No."—

Mr. Mathias: Your Honor, I would like to know whether this is leading. I don't know whether I am entitled to an objection or not. I didn't see anything read so far that contradicts anything this witness states, and a great deal of the deposition transcript is being read into this record and I don't see any basis being laid for it, so I think I am entitled at this point to be told where it's leading to.

【967】 Mr. McInerney: Haven't come to my question yet and I think this is the appropriate time—

Judge Hinkes: But is the reading of that lengthy portion of the transcript necessary for the question?

Mr. McInerney: Yes, it is, sir and it's not very much longer.

Judge Hinkes: Very well.

Mr. McInerney: "Question: You never received that information?"

"Answer: No. I don't know now.

"Question: Did you ask who the competitive bidder was?"

"Answer: No.

"Question: And he didn't tell you this either?"

"Answer: No.

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"Question: Did you ask him whether the price that Borden was quoting was above the competitor's price or below the competitor's price?"

"Answer: No.

"Question: Or precisely at the competitor's price?"

"Answer: No.

"Question: You didn't ask him any of those things?"

"Answer: No.

"Question: And he didn't volunteer any of that [968] information?"

"Answer: No, he didn't."

By Mr. McInerney:

Q. Now, in the course of answering those questions, Mr. Tarr, did you ever make any reference to the remark that you have just referred to, something about sharpening your pencil? A. I didn't at that time.

Q. Did you in the course of testifying either at this deposition or your prior testimony in December of 1969 ever mention those words? A. I don't think I did but I am not sure. I don't think I did. This was so, though. I don't think the thing ever got around to questions that would bring that about. Those answers I made would be the same answers that I am making right now except through inference I brought this inference into the thing. That's the only difference here in my statements now and the statements I made then is my inference.

I answered you when it was yes or no, I answered you no on all counts there.

Mr. Mathias: Your Honor, before there are any more questions I have an objection. There was nothing read by Mr. McInerney that in any way has contradicted what this witness has testified today

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and I move that the portion of the transcript from the deposition hearing which Mr. McInerney has [969] read into this record from the bottom of page 511 to the top of page 513 of the deposition be stricken.

Mr. McInerney: Your Honor, I have not only this part of the deposition that I would like to refer to, I have a series of other questions along the same line and I think that when it is all developed you will see the connection between this prior testimony and the testimony that the witness is now giving and I think that I should not be so limited on a matter of this importance.

Mr. Mathias: Your Honor, what he has done is to put a portion of the deposition transcript into evidence in this case without laying any foundation that he has exhausted the recollection of this witness or that the witness's present testimony is in any way contradictory to that prior testimony, and I believe that whether it's on cross or what the nature of the interrogation is, the same rules apply to introducing prior deposition testimony as was applied to complaint counsel at the time that Mr. Minkler testified.

Mr. McInerney: I don't think that the same rules apply on cross-examination as they do on direct examination and, as I recall, your Honor allowed Mr. Mathias to in fact introduce portions of the deposition testimony in evidence over my objection.

I think that on this aspect of the case in cross-[970] examination I should not be hampered in this manner.

Judge Hinkes: Well, there is no reason to get involved with the recitation of a deposition which is consistent with the testimony that has been given. That would be a surplusage of the record and certainly to be avoided if it's at all possible.

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Now I have heard the recitation of the transcript and I have also listened to the testimony of the witness, and I must say that I see nothing inconsistent. He was not asked the identical questions that he is being asked now.

Mr. McInerney: Your Honor, this remark was first injected into this case—

Judge Hinkes: Which remark are you speaking of?

Mr. McInerney: This "Sharpen the pencil" remark.

Judge Hinkes: That is right.

Mr. McInerney: —after years of pre-trial depositions and so on—

Judge Hinkes: But that was hardly necessary to read the depositions. I think had you asked the witness simply had you ever mentioned this sharpening of the pencil before in this proceeding he undoubtedly would have answered no and that would be the end of it and you wouldn't have to read the deposition.

Mr. McInerney: You Honor, I will at the [971] appropriate time argue whether or not there is inconsistency in the prior testimony, but I must be able to ask the witness questions about the prior testimony before I can make that argument. I intend to lay that foundation.

Judge Hinkes: That is what I was referring to before when I said that I see nothing inconsistent. He was not asked and he did not deny at that time anything concerning the use of the words "Sharpen the pencil."

Mr. McInerney: Because the words had never been mentioned, your Honor, and if I may, I would like to point out that he was not asked anything

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about it yesterday when he volunteered the following, and this is the problem.

The remark first came about at page 884 of the record here. Mr. Mathias asked a question which is simply as follows:

"You stated paper gallons. Did you mean the glass gallon"?

And then he said, "Answer: Yes. We left the glass gallons out and then sometime right about that time Elmer said to me "Look, sharpen your pencil a little bit because you are not quite there," meaning what the other party was bidding I guess.

So we developed the new one and I think it came out a little higher because we found some products"—and I think the witness said "By products." Is that right, Mr. Tarr?

【972】 The Witness: Yes, sir.

Mr. McInerney: —"found some byproducts that we could give a little better deal on and we did."

Now, it wasn't in response to any question asked in this proceeding either.

Mr. Mathias: Your Honor, I object to the way Mr. McInerney has characterized the record. He has left out the question which Mr. Tarr has answered. He has read a contradicting statement which complaint counsel read into the record.

The actual question on page 884 was, "What occurred after this communication from Mr. Schmidt?" and "Answer: We changed the quote and left out the paper gallons and developed the things along the lines"—and complaint counsel interrupted to clarify the record stating, "You stated paper gallons. Did you mean the glass gallons?

"Yes. We left the glass gallons out and then sometime right about that time Elmer said to me

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'Look, sharpen your pencil a little bit because you are not quite there,'" and I believe that is very responsive to the question which was, "What occurred after this communication from Mr. Schmidt"?

Judge Hinkes: Well, in any event, this comes back to what I said before. The questions that you are asking this witness now are not the same questions that were asked of him yesterday. The question asked of him was what took place. [973] Today you are asking him was such and such said. You are pinpointing your question to a specific utterance and he denies that utterance.

Now there is no necessary inconsistency in that situation.

Mr. McInerney: Well, I am not sure, your Honor, exactly what the witness is going to say with respect to this, and I think if it is true that, as I think I can represent to your Honor, this whole course of dealings has been testified to several times and a lot of questions were asked on every aspect of it, and now for the first time the witness believes he remembers a remark that was never made before, I think I am entitled to examine into that in some detail.

Judge Hinkes: Yes, you are, but it wasn't necessary to read the deposition. That is my only point. All you need do I say is ask this witness, not merely limit it to the deposition, "Did you ever mention this business of sharpening the pencil before yesterday," and the witness will give us a straight answer to that.

And I will ask Mr. Tarr that very question.

Have you ever employed that expression about sharpening the pencil, a remark, that you say Mr. Schmidt used, before yesterday?

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The Witness: Not in any deposition before the
[974] FTC.

Judge Hinkes: In any investigational interview or something of that sort.

Mr. Mathias: He was never interviewed, sir, other than the deposition of last December and an investigational hearing in 1969.

Judge Hinkes: Did you mention that in the investigational hearing of '69?

The Witness: No, I don't think I did.

Judge Hinkes: Very well.

Now that is the inconsistency if you want to argue it.

Mr. McInerney: I think it goes further, though, your Honor, if I may continue.

Judge Hinkes: You may.

By Mr. McInerney:

Q. Didn't you on prior occasions testify that the only clew you had was this \$50,000 remark that you attributed to Mr. Schmidt? A. I don't know that.

Q. Now, in an attempt to refresh your recollection with respect to that, I would like to read from pages 516 and 17 of the deposition testimony.

Mr. Mathias: Your Honor, suppose he starts by showing those pages to the witness and seeing if the witness—

[975] Mr. McInerney: No, I would like to get this in the record. I think it's important.

Mr. Mathias: If it's to refresh his recollection, your Honor, it should be proceeded with in that manner first.

Mr. McInerney: Well, if it also—

Mr. Mathias: Excuse me. I would like to finish.

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If it's for the purpose of introducing this information into the record, well then, I think that he must follow the same rules that complaint counsel had to follow last week and he must show that the witness's recollection has has been exhausted or that he has made an inconsistent statement.

Judge Hinkes: I presume, Mr. McInerney, you are going to try to demonstrate to the witness some inconsistency, is that right?

Mr. McInerney: In part, your Honor.

Judge Hinkes: The witness should be allowed to see the inconsistency first of all.

Mr. McInerney: Your Honor, I really don't believe that I need to follow that approach. I think that whatever the witness says at this point in time we have this prior testimony which I believe is relevant to whether or not his memory is entirely accurate with respect to this.

Judge Hinkes: No. The witness is entitled to be confronted with the alleged inconsistency and not simply to be told of the inconsistency which may or may not be exactly true.

【976】 Mr. McInerney: I will do whatever your Honor says of course, but I submit to you that I have a right to have this record show the alleged inconsistency so that I can refer to it at a later date.

Judge Hinkes: After the witness has examined the so-called inconsistency. Perhaps he has some sort of explanation and then you can state for the record what that inconsistency is and make your argument on it.

Mr. McInerney: All right, your Honor.
I have only one copy of this.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Sir, would you read on page 516, line 16—and so I won't be accused of leaving anything out—down to page 519, line 12. There is some colloquy in there that I would have left out if—

Mr. Mathias: Your Honor, I believe first of all it should start with line 4 for the very reason that it should be pinpointed which meeting was being discussed here.

Mr. McInerney: Your Honor, there will come a point in this proceeding when I will object, and I think that point has now been reached, that Mr. Mathias's arguments are suggestive to the witness and I think that he ought to state his objection without doing that.

Mr. Mathias: Your Honor, I will state my objection. I object to Mr. McInerney using a portion of the record [977] dealing with one meeting to attempt to contradict a statement which Mr. Tarr has testified had occurred at a later date.

Mr. McInerney: As you see, this is the kind of thing—I am not refusing to let the witness read from line 4, which is what you are suggesting. What I do object to is your characterization of what that shows. I think that is entirely unnecessary.

Judge Hinkes: Well, instruct the witness exactly where he should be reading, if you will, Mr. McInerney, and once again remind the witness of what he is reading this portion for.

In other words, your pending question which has to do with the \$50,000.

Mr. McInerney: Yes and whether that was the only clew.

Judge Hinkes: Yes.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Commencing at the top of page 516, Mr. Tarr, would you read that, and take your time. A. Yes.

Mr. McInerney: Incidentally this transcript will show that Mr. Mathias at a certain portion of it referred the witness to his prior testimony in the investigational hearing, and I have that here too, which I would be [978] happy to show the witness so that he has it all in front of him.

Judge Hinkes: Dealing with the same question, you mean?

Mr. McInerney: Yes, sir.

Judge Hinkes: If it is a question of refreshing the witness's recollection you may show him.

[979] Mr. Mathias: Your Honor, I don't have a copy of that with me at the moment and while the witness is reading the other transcript I wonder if I might have a brief look at this.

Mr. McInerney: Sure. That is our only copy of that.

Mr. Mathias: Thank you.

The Witness: I have read it.

By Mr. McInerney:

Q. Now, would you also read what Mr. Mathias referred to in the course of that which I think he referred you to something from pages 440 and 441 of the investigational hearing transcript.

Have you read this now, sir? A. Yes.

Mr. White: Might we have the question again? It has been so long I have forgotten it.

Judge Hinkes: You might ask it again, Mr. McInerney.

Testimony of Gordon Tarr

By Mr. McInerney:

Q. Now, isn't it true, Mr. Tarr, that in the investigational hearing transcript in 1969, and in the deposition of 1971 you testified rather extensively with respect to your conversations with Elmer Schmidt on this subject of private label and stated that the only clue you had [980] with respect to what the competitive offer was was this reference to \$50,000 being a drop in the bucket?

Mr. White: I would like to raise an objection. Just so nobody will complain when I state my reasons, it might be well if the witness leaves the room.

Judge Hinkes: Mr. Tarr, would you be good enough to step out of the room for just a moment?

The Witness: All right.

(The witness withdrew from the Courtroom.)

Mr. White: Your Honor, I object to the question as an improper summarization of the testimony that has been shown to this witness. The transcript of the deposition, starting at page 516, deals with a conversation, a particular conversation that he had with Mr. Schmidt which, according to his testimony, was an entirely different conversation than the one about sharpening the pencil that occurred before that.

It occurred at the time that he was called over there and told that they were shocked and all this sort of thing as a result of the competitive price, and that is the conversation at which the \$50,000 was mentioned.

The conversation concerning the sharpening of the pencil happened several days later at least. It was after another two or three meetings in between time and to, in effect, ask him based on this and ask him a summary question which assumes that this is con-

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tradiictory of what he said I [981] think is improper, improper summarization.

Judge Hinkes: The question is improper. The question that should be asked of the witness now is the same question that you asked him before he read these documents, whether or not the \$50,000 saving was the only reference to saving or bidding or anything else that you have in mind, Mr. McInerney, in view of what he read in those documents.

He will either say that his testimony now ought to be changed or else he will say no, in which case you can introduce the so-called inconsistent statement to affect his credibility and that is all there is to it.

You should not ask him a question which depends upon your characterization of what he said. That is not the issue.

The issue is what is the correct answer to your preceding question. He answered it once. You are now attempting presumably to demonstrate that that answer is not consistent with other answers that he gave earlier.

Now, having read these other answers, you ask him that same question once again, and if he changes his testimony, well and good.

Then we have a change in his testimony and that may be argued affecting his credibility. But, if he says no, he maintains his original position and you think that earlier testimony is inconsistent, you offer that inconsistent portion [982] in evidence because it is impeachment evidence and that is all there is to it.

Mr. McInerney: Your Honor, I tried not to have to summarize the testimony for myself by reading it to the witness and I was not permitted to do that, so I really think that the objection now that I am

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somehow improperly summarizing it is an attempt to box me in on the cross-examination of this witness.

Judge Hinkes: No. I see no boxing in of any kind. You are still permitted to ask the original question you asked. You are still permitted to get the witness to contradict himself. You are still permitted to demonstrate that he contradicted himself earlier. That is your case, as I see it, and I see nowhere any boxing in.

This is solely for the purpose of establishing an inconsistency. Therefore, ask him the question once again and see if he will now be inconsistent.

Mr. McInerney: I should point out to Your Honor that whether or not there is a direct inconsistency here, and I think there is, but even if there were not, the mere fact that we had such extensive testimony on this matter so often and in such detail and that this was not mentioned I think has a bearing on whether or not this actually happened.

Judge Hinkes: I don't dispute your right to make that argument. I am only concerned with the mechanics now.

【983】 Mr. McInerney: Yes, sir.

Judge Hinkes: And if he does then say that he sees nothing inconsistent in his previous testimony with what he is testifying today, then you simply offer this previous testimony and argue its inconsistency with what he testified today. That is all. You needn't go into any great length about it here with this witness at this time. You simply get him to state whether or not there is an inconsistency. That is all.

Mr. McInerney: I don't think the witness is going to state that there is an inconsistency.

Judge Hinkes: Why should we speculate whether he does or not? You still have the argument open

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to yourself. In other words, whether he believes it inconsistent or not is not the final answer. The final answer will be mine, based upon the argument that you can advance and that will be in your brief.

Mr. McInerney: I have no choice, Your Honor.

Mr. Mathias: Shall I invite Mr. Tarr back in?

Judge Hinkes: Yes, please.

(The witness re-entered the Courtroom.)

By Mr. McInerney:

Q. Mr. Tarr, would you agree that your memory of the private label negotiations that led up to this final quotation from Borden to A&P, that your memory with respect to all those [984] events back in 1964 and 1965 is not perfect? A. I believe everything I testified and said definitely that was so was so. I referred to notes that I had taken in many instances.

Q. But my question was whether— A. There is a lot of things I have left out in the whole thing. Maybe today and the other two times I didn't. There were some things that might have occurred that I could look up or that I could remember suddenly that did happen. I didn't just remember this sharpening of the pencil deal. I knew that all the time. It just never came about that I testified, and there are probably many other things in my testimony that wasn't a complete testimony of everything if we didn't get on those subjects.

I won't say that there wasn't other things I didn't say. I will say that. They could have been left out of the thing that I could have said and it is in my mind. It is in my memory.

Q. Well, I think you told us yesterday at page 873 of the transcript, "I may not have these things in proper sequence." A. This is correct.

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Q. Would you agree with this today? A. Yes.

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【988】 Mr. White: Yes.

Judge Hinkes: Well, then, shall we say that if the notes are not received, then, by Mr. McInerney one week from today that we can assume there are no such notes?

Mr. White: Well, I will report, Your Honor. As soon as I get back I will report on it.

Judge Hinkes: Very well. That is fine.

Mr. White: We don't need to depend on my lack of saying anything to determine whether or not we get the notes.

Mr. Mathias: Your Honor, I would take it that since there has been a specific request by A&P that these notes would be made available to Complaint Counsel as well since we were not aware of the existence of any such notes in the event they are made available to A&P Counsel.

Mr. White: They will be available to all three parties.

Judge Hinkes: Fair enough. We'll have a report, then, from you when we resume next week, I hope.

Mr. White: Yes, Your Honor.

Judge Hinkes: Very good.

You may continue, Mr. McInerney.

By Mr. McInerney:

Q. Now, did reading those portions of the transcript that were shown to you, Mr. Tarr, refresh your recollection that in arriving at this \$820,000 quotation the only clue that you had 【989】 was this reference to \$50,000 savings or possible savings by elimination of in-store promotion?

A. Yes, but that was only a drop in the bucket.

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Q. I am sorry? A. The \$50,000 was only a drop in the bucket as I testified.

Q. And that was the clue that you were working with when you came up with the \$820,000? A. This is right; this is correct.

Q. Now, I think you have told us that Elmer Schmidt never suggested what your final quote should be; is that correct? A. That is right.

Q. The reference that you had made before to some kind of a price change that may have had some connection with this remark about sharpening your pencil, that was to by-products, wasn't it? A. It was a differential. It was a differential on the thing—you mean the changes that were made, if any, yes, it was on the by-products, any changes.

Q. Now, the actual final offer that was submitted to A&P supposedly resulted in a cost saving to A&P of \$820,000; isn't that correct? A. I am not sure but I think so.

* * * * *

【1001】 A. That is correct, approximately, and—whether the little addition or not, it is still approximately \$820,000.

Q. And that was true throughout? A. Yes, but there could be a little difference in the approximation.

Judge Hinkes: But it was still approximately. Is that what you are saying?

The Witness: Yes, still approximately. In my opinion, it was a little more but still approximately \$820,000.

Judge Hinkes: Do I understand your testimony that the result of Borden's work following Schmidt's request to sharpen their pencils was not a material change in the \$820,000 figure of savings but only a slight, if any, change?

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Is that what you are saying?

The Witness: I am saying something like Mr. McInerney had mentioned. It might have been \$5,000, it might have been \$8,000, it might have been more or less.

Judge Hinkes: And you regard that figure as being approximately \$820,000?

The Witness: Yes.

By Mr. McInerney:

Q. And you don't presently recall what it was? A. No, that is correct.

Q. But you would agree with his Honor's question that it was insignificant in your mind? **【1002】** A. It was insignificant in the all-over amount.

That is what Elmer said, that it was only a small amount. "Just sharpen your pencil a little bit. There is only a small amount."

Q. Now, you did testify previously, did you not, that Elmer did not tell you what the other quotation was? A. Yes, sir, I have said that many times.

Mr. McInerney: May we take a short recess, Your Honor?

Judge Hinkes: Very well. We will be in recess for five minutes.

(A brief recess was taken.)

Judge Hinkes: You may continue, Mr. McInerney.

By Mr. McInerney:

Q. Mr. Tarr, is it still your best recollection that at some point in these negotiations Mr. Schmidt said to you, "Sharpen your pencil"? "You are not quite there yet." A. Yes, that he said to me on the telephone.

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Mr. McInerney: Your Honor, we will offer as our RA&PX 7, pages 511 through 520 of the deposition of Mr. Tarr, taken on December 2 and 3 of 1971, and incorporated in that is a reference to his prior testimony at the investigational hearing. The reference is only to pages 440 to 441 of that ex parte investigational transcript, but for the sake of completeness, I think, so that there won't be any * * *

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【1006】 * * *

By Mr. McInerney:

Q. Now, Mr. Tarr, when—

Judge Hinkes: Pardon me. Just for the record, I think we should state that the document in question is not being submitted at this time. Permission is granted to Mr. McInerney to submit a copy of the pages which have been received in evidence and you will do so, I presume, Mr. McInerney, within the next week or ten days?

Mr. McInerney: Oh, yes.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. Mr. Tarr when you submitted your final quotation to A&P, did you feel that Borden actually had to meet or beat the prices being offered by the competitor? A. Did I feel at the time we brought the figures over I thought we met them? Probably. I don't know as I had any feeling about whether we had to meet them. I was quite sure this is apparently what Mr. Schmidt had been trying to arrive at.

Q. Well, my question was: Was it your feeling that you

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actually had to meet those prices being offered by the competitor? A. You mean prior to that time?

【1007】 Q. At any time. A. Well, I never felt that we were going to lose the business. I felt that somehow we were going to keep the business. I felt a little confident at that stage of the game that we would.

Q. Well, my question, Mr. Tarr, was: Whether in giving your final quotation— A. At that time?

Q. In giving your final quotation for private label milk to A&P, did you feel that you actually had to meet the competitor's quote? A. Had to beat the competitor's quote? No, I didn't.

Q. I am sorry. I didn't hear something. A. I didn't feel that we had to beat the competitor's quote.

Q. I used the word "meet". A. "Meet". Well, I don't think I had any feelings along that line at all. I thought this was it. This was what we had arrived at. I didn't feel—I think prior to that time I felt perhaps that we didn't have to meet this but I thought we were meeting it.

Q. Didn't you feel that you didn't have to actually meet the competitor's quote but only come close to it? A. Well, I thought if we were close to it it would be all right, yes.

【1008】 Q. So is it your testimony that in submitting this private label quotation to A&P you did not feel that you had to actually meet the competitor's quote? A. Well, I don't imagine—perhaps we did have to actually meet it. We had to be right up there.

Q. But you thought you had some leeway? A. Possibly, yes.

Q. Well, is it possibly or do you recall that you didn't feel that you had to actually meet— A. Well, you are asking how I felt. Now, at that time I felt that we had met the proposition, that we were at least as high as the other party, and that there was no problem left.

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Now that is how I felt. You are asking how I felt at that time. There were times prior to that in the discussion, all this discussion, when I felt perhaps if we didn't get quite up to the bid that we would still retain the business but at that time my feelings were that we had met it so I can't quite follow your question.

Q. My question is very simple. It is whether at the time you submitted the final quote you felt that you actually had to meet the competitor's quote. A. I felt we were meeting it.

Judge Hinkes: Well, did you feel you had to, not that you were or were not, but that you had to?

The Witness: Well, no I didn't feel—if I * * *

* * * * *

【1015】 Q. And when you submitted that, did you not know what the relationship was between the Borden offer and the competitor's offer? A. That is right.

Q. Now, did you ever consider getting a letter from Elmer Schmidt or from somebody at A&P with respect to what the competitive offer was? A. No, I didn't expect to get anything like that.

Q. Did you consider inquiring, either at the time that you submitted the final offer or after that, with respect to what the relationship was? A. No.

Q. That wasn't even considered internally within the Borden organization? A. As far as I know it wasn't.

Q. Now, did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that the private label quotation was not cost-justified? A. No.

Q. Did you or anyone in your presence ever mention to Mr. Schmidt or anyone from A&P that these prices would not be made available to others? A. No.

Q. Did you ever, in your discussions with Mr. Schmidt, refer to the Robinson-Patman Act? 【1016】 A. No.

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Q. And did anyone in your presence ever refer to the Robinson-Patman Act in discussions with anyone from A&P? A. No.

Q. Did Mr. Schmidt at or around the time of the submission of this final quotation ask you for a letter stating in words or substance that these prices would be made available to others? A. No.

Q. Are you sure of that? A. Yes, I'm sure of that.

Q. Did he ask you for any kind of a letter or assurance from Borden? A. Well, there was something asked. I can't remember where this thing came from, but there was a letter written. It wasn't that it would be available to everybody.

Q. What was it? A. I just can't remember the letter. The letter has been used in open testimony here in the last deposition I made and it was shown to me and it was my signature.

I didn't author the letter, I don't know who did.

Q. I will show you that letter in just a moment but— A. But maybe that is what you have reference to and someone, I am quite sure someone asked for it and I don't know whether Elmer Schmidt did.

* * * * *

【1025】 * * *

Judge Hinkes: Did you intend to convey any message to A&P when you signed that letter?

The Witness: I only signed it because this is the letter that was apparently supposed to go over to A&P. It was prepared for me by somebody.

Judge Hinkes: Did you know the content of the letter when you signed it?

The Witness: Yes.

Judge Hinkes: Very well now. If you knew the content of the letter, then I think that you ought

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to be in a position to know your intentions with respect to sending it to A&P, which you, of course, are responsible for.

The Witness: I think it was in answer to a request that A&P made to us, someone in A&P made to us to—I don't know what they asked for exactly—

Judge Hinkes: Well, let me put it to you this way: Was it your intention to comply with the wishes of A&P?

The Witness: Yes.

Judge Hinkes: Very well.

You may continue, Mr. McInerney.

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Testimony of Orville Gose

June 21-22, 1973

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【1050】 Judge Hinkes: I don't know that it does.

Mr. Curnin: And the witness has not yet testified.

Judge Hinkes: I would think, however, that complaint counsel will connect this up to demonstrate its connection with A&P in particular, rather than just a change in selling prices generally. Is that possible, Mr. Mathias?

Mr. Mathias: Yes, sir, we will.

Judge Hinkes: On that condition I think the document can be accepted. Is there any objection, Mr. White?

Mr. White: No, nothing special, Your Honor.

Judge Hinkes: Very well. I shall receive the document subject to the condition I have stated.

(The paper referred to, heretofore marked for identification Commission Exhibit 79, was received in evidence.)

By Mr. Mathias:

Q. Now, Mr. Gose, has the reading of CX-79 refreshed your recollection as to certain cost increases which had been incurred by the Borden Company prior to the date of this document which was May 25, 1966? A. I am not sure I understand that.

Mr. Curnin: Your Honor, I am not sure that the witness has testified that he doesn't have a recollection of increases that were incurred by the Borden Company.

By Mr. Mathias:

Q. Well, do you recall increases in labor costs in the spring 【1051】 of 1966? A. Yes, I do.

Testimony of Orville Gose

Q. And do you recall that some time earlier Borden had also incurred an increase in Purepak container costs?

Mr. Curnin: May we have that as to point in time, Your Honor?

Mr. Mathias: Your Honor, sometime previously.

Judge Hinkes: Just prior to 1966 is your question?

Mr. Mathias: Yes, sir.

Judge Hinkes: The witness will answer.

The Witness: Yes, sir.

By Mr. Mathias:

Q. And do you also recall, Mr. Gose, as to whether or not Borden at about this time, the spring of 1966 or shortly earlier, had incurred an increase in Social Security tax cost? A. I don't recall that in particular.

Q. Now, Mr. Gose, do you recall having been involved in negotiations with the A&P Company concerning a request by Borden for an increase in private label prices as a result of these cost increases to which you have referred?

Mr. Curnin: I object, Your Honor, to the use of the term "negotiations."

Judge Hinkes: Well, that is up to the witness to tell us whether it is that or not. The question is entirely proper. The questioner wants to know if the witness was engaged in negotiations.

【1052】*By Mr. Mathias:*

Q. Do you recall the question now, sir, or would you prefer it to be read? A. Do you mind?

Mr. Mathias: May we have the question read?

(The reporter read the question.)

Testimony of Orville Gose

The Witness: Yes, I do.

By Mr. Mathias:

Q. And when did these negotiations start, sir? A. As I recall, I presented the price increase to A&P around May of 1966.

Q. And did you personally make the approach to A&P? A. Yes, sir.

Q. And who did you contact at A&P, sir? A. I contacted Mr. Elmer Schmidt.

Q. And what occurred at this meeting?

Judge Hinkes: Just a moment. When you say you presented the cost increases to Mr. Schmidt, what cost increases are you referring to now?

The Witness: I submitted cost increases to Mr. Schmidt on Borden and private label milk products.

Judge Hinkes: Yes, but what cost increases of Borden's did you submit to Mr. Schmidt?

The Witness: The cost increases—

Judge Hinkes: Let me make it a little clearer. Did [1053] you submit to Mr. Schmidt a recitation of Borden's cost increases or a statement of A&P's cost of milk and its increase?

The Witness: I submitted to A&P the increase to their existing price of private label and Borden milk at that particular time.

Judge Hinkes: Did you include any statement of Borden's cost increases in addition to the increase in the price that was going to be charged to A&P or that was being proposed to be charged to A&P?

The Witness: I submitted the document that I just read.

Judge Hinkes: This Commission Exhibit 79 you mean?

The Witness: Yes, sir.

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Judge Hinkes: You actually transmitted that to Mr. Schmidt, is that what you are saying?

The Witness: Yes, sir.

Judge Hinkes: I see. Very well. Thank you. You may continue, Mr. Mathias.

By Mr. Mathias:

Q. Now, Mr. Gose, do you recall what Mr. Schmidt said to you at this meeting? A. Mr. Schmidt at my meeting with him did not acknowledge the price increase. He indicated that the matter would have to be discussed with his superiors.

Q. Was this both as to the private label and to the Borden **[1054]** label? A. At that point, yes.

Q. And what did you say to Mr. Schmidt, sir? A. As I recall, I indicated that I would wait for his reply and hopefully would hear from him soon, something of that nature.

Q. And what happened next, sir? A. Shortly after my visit to Mr. Schmidt I received a telephone call from Mr. Schmidt at which time he stated that they would not accept this increase on the private label. They would with regard to the Borden label.

Q. So were the Borden label prices then increased by this amount, sir? A. To my recollection they were.

Mr. Curnin: May we know the amount of the increase, Your Honor?

By Mr. Mathias:

Q. Showing you Commission Exhibit 79, was the amount the same as shown on that Exhibit, sir?

Mr. Curnin: May we know, Your Honor, whether the witness has any recollection on this matter?

Judge Hinkes: I don't know that we want to tell

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Mr. Mathias what questions to ask. You can cover that in your cross-examination.

Mr. Curnin: Yes, Your Honor.

The Witness: To my recollection this is the increase [1055] which was passed on to A&P with regard to the Borden label.

By Mr. Mathias:

Q. That is the increase indicated on CX-79? A. Yes, sir.

Q. At the time you visited Mr. Schmidt, who was present at the meeting? A. Obviously I was present and I cannot recall if anyone else was present or not.

Q. The only ones you can recall are yourself and Mr. Schmidt at this time? A. Yes, sir.

Q. Did you report the results of your meeting to your superiors, sir? A. Yes, sir, I can.

Q. Now, Mr. Gose, subsequent to the notification from Mr. Schmidt that he would accept the increase on the Borden label, but not on the private label, did you continue to negotiate with A&P for an increase in the private label prices? A. I do not recall having any further discussions in the immediate future or thereafter.

Q. Well, were there any at any period thereafter, sir? A. Yes, sir, there was one other occasion later.

Q. And when was this, sir? A. In the early part of 1967.

Q. This was approximately a year later, sir? [1056] A. Approximately.

Q. And what happened on this occasion, sir? A. A price increase was presented to Mr. Schmidt in the spring—I would have to guess. Around March of 1967.

Q. And was this related in any way to your earlier request for a price increase? A. Yes, I am sure it was related to price increases that had taken place.

Q. This was the cost increases that had occurred back in 1966? A. To my best recollection, yes.

Testimony of Orville Gose

Q. Now what occurred at this time? Did you meet with Mr. Schmidt at this time? A. Yes, sir.

Q. This is in March of 1967? A. In that general area of time.

Q. And do you recall if anyone else from Borden Company was with you at this time? A. At this particular time I couldn't say for certain if anyone was with me from Bordens.

Q. And do you recall who you met with from A&P? A. I met with Mr. Elmer Schmidt.

Q. Now what occurred at this meeting, sir? A. I presented Mr. Schmidt with a price increase.

Q. And what was Mr. Schmidt's reaction, sir? A. I recall him indicating that he would discuss it with his [1057] associates and I don't remember him acknowledging anything other than the fact that he was going on vacation and I might have to deal with a Mr. Bob Witzke.

Q. How do you spell that, sir? Is that W-i-t-z-k-e? A. That is close. That is close.

Q. Did you have any subsequent dealings with Mr. Schmidt or Mr. Witzke concerning the request for a price increase? A. There was a request for a breakdown or an analysis of certain labor cost factors that were involved.

Q. And what did you do at this point, sir? A. Oh, in acknowledging this request, I recall Mr. Malone preparing a rather detailed breakdown of labor changes that had taken place.

Q. And was this then submitted to A&P, sir? A. As I recall, this information was made available to A&P.

Q. And what occurred next then, sir? A. Shortly thereafter it was requested that we discuss the matter with Mr. Ira Bartels.

Q. What was Mr. Bartels' position at that time if you know, sir? A. Mr. Bartels examined the figures that Mr. Malone had prepared. He asked certain questions regarding the labor increased involved. I recall that he raised a

Testimony of Orville Gose

question with regard to container expense. That I remember.

Q. And did he indicate whether or not the price increase was [1058] acceptable to A&P, sir? A. He indicated that it was as proposed not acceptable, and ultimately in the overall conversation he did indicate that an increase in the area of around two mills per point seemed reasonable, words to that effect.

Q. And what was Borden's reaction to this suggestion, sir, or your reaction?

Mr. Curnin: Your Honor, instead of having indications and reactions, may we have the substance of the conversation?

Judge Hinkes: Yes. Before we go to that though, you say that Bartels suggested this two mills instead of what?

The Witness: Instead of the increase that we had submitted or put through to them.

Judge Hinkes: And was that increase $3\frac{1}{3}$ mills approximately as noted on this Commission Exhibit 79?

The Witness: Not on that report or document, Your Honor.

Judge Hinkes: What was not on this document?

The Witness: There was another—

Judge Hinkes: No, I am only referring to the figure. Was the increase that Borden requested of Bartels the same figure that is on this document, approximately $3\frac{1}{3}$ mills?

The Witness: As I recall, it would be approximately that figure there. I don't remember if it was exactly that figure.

[1059] Judge Hinkes: All right.

Testimony of Orville Gose

By Mr. Mathias:

Q. Mr. Gose, I hand you Commission Exhibit 101A and B, and ask you if you can identify this document, sir.

Are you familiar with this document, sir? A. Yes, sir.

Q. And what is it, sir? A. This document was presented to Mr. Schmidt by me in March of 1967.

Q. Now does this indicate the amount which you were seeking insofar as increased private label prices were concerned in the spring of 1967? A. Yes, sir.

Q. And after Mr. Bartels stated that a two-mill price increase might be acceptable, what did you say to Mr. Bartels, sir? A. I stated that we appreciated our audience with him; that I would have to return to my office and discuss the entire matter with my superiors.

Q. Who were your superiors at that time, sir? A. As I recall, at that time I discussed the matter with Mr. Dave Patterson, who was then president of our new district.

Q. And he was residing in Columbus, Ohio, I believe? A. Yes, sir.

Q. And what occurred next, sir? A. I received knowl-edgement from Mr. Patterson and we placed this [1060] increase into effect.

Judge Hinkes: Which increase?

The Witness: The approximately two mills, Your Honor.

By Mr. Mathias:

Q. The increase suggested by Mr. Bartels? A. Yes, sir.

Q. Now do you recall what Mr. Bartels' position of em-ployment was with the A&P Company at this time? A. I recall him being head buyer for the Chicago unit of the A&P Company.

Q. He was the superior to Mr. Schmidt? A. Yes.

Q. Now, what part did Mr. Joseph Malone play in the

Testimony of Orville Gose

negotiations with A&P concerning this request for a price increase? A. Mr. Malone prepared the background data for these increases and he also prepared the additional information as requested by Mr. Bartels and Mr. Malone attended the meeting with Mr. Bartels and myself. Mr. Malone was present.

Q. During the course of these negotiations did you consult with Mr. Malone? A. In what regard, sir?

Q. In regard to the nature of the price increase request to A&P? A. I am sure I consulted with Mr. Malone with regard to the information that Mr. Malone prepared, the labor increase cost [1061] information. I don't remember anything specific about the discussion that I can recall.

Q. Now, Mr. Gose, when Borden had originally incurred these cost increases in the area of labor and container costs, did Borden pass on these cost increases in its pricing to other customers in the Chicago region? A. Yes, sir.

Q. And I believe you have already stated that in the spring of 1966 you passed these cost increases on to A&P in connection with your Borden label sales to A&P Stores, is that correct, sir? A. I wasn't concentrating on that question.

Mr. Mathias: Would you reread the question?

(The reporter read the question.)

The Witness: We passed the increase on to all other store customers.

By Mr. Mathias:

Q. Now in the course of your dealings with Mr. Schmidt did you inform Mr. Schmidt that these cost increases had been passed on to your other customers? A. Yes.

Judge Hinkes: When you speak of the cost increases having been passed on to other customers,

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what cost increases now are you referring to? Is that the 3½ mills or whatever the amount was, or is it the two mill cost increase or just what is it?

【1062】 The Witness: In '66 that was the three-mill increase, Your Honor.

Judge Hinkes: And in '67 was there another cost increase passed on to your other customers in a larger amount or an additional amount?

The Witness: In '67, as I recall, our cost increase didn't come until a later period during that year.

Judge Hinkes: Well, let me try to be a little clearer. When you spoke to Mr. Schmidt in 1966, around May, you told him and showed him a cost increase of approximately 3½ mills per point?

The Witness: Yes, sir.

Judge Hinkes: And if I understand your testimony, that cost increase was passed on to your other customers at that time in the form of an increased price per point to them.

The Witness: Yes, sir.

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【1076】

AFTERNOON SESSION

1:15 p.m.

Judge Hinkes: Mr. Mathias?

Mr. Mathias: No more direct, Your Honor.

Judge Hinkes: Mr. White?

Cross-Examination by Mr. White:

Q. Mr. Gose, did you have any internal considerations within Borden in which you participated shortly after the time that Borden started serving A&P with private label milk in the Chicago area as to offering private label at

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substantially the same prices that you were selling to A&P to other customers in the Chicago area? A. Yes.

Q. And with whom did you have these discussions at Borden? A. As I recall, they were discussed with Mr. Minkler and with people from our legal department.

Q. From the Borden Law Department? A. Yes.

Q. And what were the conclusions of those discussions, can you tell us? A. The conclusions were that we were told that we should not use this price in the solicitation of other accounts because our price to A&P was a meeting of competition price.

Q. Now, did you, however, discuss with other customers or potential customers in the Chicago area the possibility of [1077] supplying them with private label products? A. Yes, sir.

Q. With whom did you have such a discussion, Mr. Gose? A. I recall having discussions with the buyer of the Kroger Company in Chicago.

Q. And what was that person's name? A. The person's name was Mr. Arthur Blair.

Q. In relationship to the time that Borden started delivering private label to A&P, approximately when did this happen? A. I called on Mr. Blair just prior to our introduction of the private label with A&P. I don't recall the exact date, but just prior to it.

Q. And where did this conversation take place? A. At the Kroger headquarter office in North Lake.

Q. North Lake, Illinois? A. In Chicago.

Q. And was there anyone present besides you and Mr. Blair? A. Not to my recollection.

Q. And would you please tell us in substance what was said at that time?

Mr. Curnin: Your Honor, at this time I would like to interpose an objection in regard to this conversation with Mr. Blair and the witness's testimony

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as to the conversations he had with Borden personnel about offering * * *

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【1082】 * * *

At the same time that A&P makes objections such as they are now making, they insist that Complaint Counsel is under the burden to bring a cost study into this to show that the prices under this arrangement were not cost justified.

Now, Your Honor, Complaint Counsel, of course, deny that we have such burden. However, we believe that there is a great deal of evidence that has been and will be adduced in this record, much of which is based upon the internal considerations of the Borden Company which, taken as a whole, will indicate beyond a doubt that the price difference in this case could not be cost justified, and I believe that the internal considerations of the Borden Company in their dealings with A&P and others are very material to the counts involving A&P.

I believe also that A&P owes an apology in this matter to Counsel for both Borden and Complaint Counsel in connection with its prior accusations and I would like to note in connection therewith that Complaint Counsel had a great number of dealings with A&P Counsel during the course of the investigations in this matter in which Borden Counsel were not present and I don't believe that at that stage that it was appropriate for either of them to be present when we were making inquiry of the other party, and it certainly does not impute any misconduct on the part of either Complaint Counsel
【1083】 or the Borden Company.

Judge Hinkes: Well, let's not get involved in that issue. The only issue before me now is whether this

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line of questioning concerning Borden's internal considerations for the establishment of its prices, both to A&P and to others, should be considered in connection with the charges that have been made in this Complaint against A&P.

Now, the only charge that Borden has to defend is Count III, in which both Respondents are charged with having acted to fix prices, maintain prices.

This, of course, involves at least a suggestion of an agreement or an understanding and they are both joined in this respect.

And to the extent that the internal considerations of one had any effect upon the arrangements that were concluded, if there were any, between the parties, to maintain prices, they would be pertinent in this proceeding.

Now, this evidence therefore has to be admitted. Whether they will affect A&P will depend upon the nature of the evidence that we have yet to hear concerning the arrangements that can be properly imputed to both Respondents to effect a maintenance of price and we haven't yet reached that bridge.

It is a question of which should come first in this case, the cart or the horse.

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【1088】 We will wait and see. I am not going to rule it out at this stage.

You may continue.

(The witness re-entered the Courtroom.)

Judge Hinkes: The objection has been overruled.
You may continue, Mr. White.

By Mr. White:

Q. Mr. Gose, just before you were excused, while Counsel took up certain objections before the Judge, I had asked

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you to tell us the substance of your conversation with Mr. Blair at Kroger that you had just referred to.

Will you please do so? A. In substance I informed Mr. Blair that in the near future we would be packaging a private label product for one of our major customers.

I also requested the opportunity to, in the near future, present a private label program to him.

Q. What, if anything, did Mr. Blair say? A. As I recall, Mr. Blair was appreciative of the information I gave him and indicated at that first time that I visited him that it was something that could be discussed at a later date.

Mr. Curnin: Your Honor, may we have the date of this conversation, the approximate time?

The Witness: I could not give you the exact date [1089] but it was prior to our actually putting A&P's private label out on the street.

By Mr. White:

Q. In other words, assuming that that occurred on or about November 1, 1965, this conversation with Mr. Blair was shortly prior to that? A. Yes.

Q. All right.

Now, did you see Mr. Blair again? A. Later. I don't know the exact date.

Q. Would it have been in December of '65 or January of '66? A. I am sure it was in January, in early '66.

Q. And at this second conference with Mr. Blair, was there anyone present besides you and Mr. Blair? A. No one to my recollection.

Q. And where did this second conference take place? A. At the Kroger office in North Lake, Illinois.

Q. Will you please tell us the substance of that conversation? A. The substance of that conversation, Mr. Blair indicated that at that time they had absolutely no interest in a private label Kroger milk program in Chicago.

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Q. How many stores approximately did Kroger have at that time in Chicago? **【1090】** A. Approximately 60-some.

Q. Now, was there any discussion at that time about the sale of Borden brand products to Kroger for the Chicago stores? A. Yes, I discussed the possibility of presenting a Borden program to Mr. Blair and he acknowledged that I could do so.

Q. Who was supplying Kroger for its Chicago stores with milk and milk products at that time? A. The Bowman Dairy Company.

Q. Now, did you subsequently submit a proposal to Mr. Blair for the Borden brand? A. Yes, I did.

Q. And about how long after this early January '66 meeting would this have taken place? A. I do not know the exact date but I would say in the first half of 1966.

Q. And can you tell me approximately the price level at which these prices were that you quoted on the Borden label?

Judge Hinkes: Of the Borden label?

Mr. White: On the Borden label, yes, sir.

The Witness: I do not recall the actual list prices in effect that time, but our discount, our top rebate at that time was 30 percent and as I recall this proposal was slightly better than what our discount was in existence because I do remember Mr. Malone giving recognition to the added volume, the effect of the added volume, that would be **【1091】** reflected in obtaining this business.

By Mr. White:

Q. Now, after you made this proposal to Mr. Blair, what, if anything, did he say in response to it?

Mr. Curnin: May I have that question read?

(The reporter read from her notes as requested.)

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Mr. Curnin: Not to interrupt Mr. White's examination, may we note a continuing objection to these conversations?

Judge Hinkes: Very well. Your objection is noted.

Mr. White: Would you like the question read again?

The Witness: I thought I answered it but—

Mr. White: No, you didn't.

The Witness: —but if there is one pending, yes.

(The reporter read from her notes as requested.)

Judge Hinkes: That is the proposal on the Borden label; is that correct, Mr. White?

Mr. White: Yes, sir.

The Witness: At my next meeting with Mr. Blair Mr. Blair indicated that the quote that we made was over \$100,000 excessive of their present cost for milk products.

【1092】 By Mr. White:

Q. Now, when you say "over \$100,000", did Mr. Blair explain that? Was that on an annualized basis or did he simply say that? A. That was based on taking our price quotation as against their current volume levels as compared to the same volume levels with the price that they were currently paying.

Q. And this conversation where he told you this, was it shortly after you had made the submission of the Borden proposal on the Borden label to him? A. Yes, I remember that he got back to me quite soon after I had submitted the proposal to him.

Q. I think we have covered this but I want to make sure.

Going back to your meeting with Mr. Blair in January, do I correctly understand that at that meeting he told you that Kroger was not interested in a private label for its Chicago stores? A. That is correct.

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Q. Mr. Gose, I hand you a document which has been marked RBX1-A through 1-J for identification.

(The document referred to as RBX1-A through 1-J was marked for identification.)

By Mr. White:

Q. Can you tell me what that document is, sir?

Mr. Mathias: Your Honor, I wonder if Complaint [1093] Counsel could be given the opportunity to read the document because it is the first we have seen it, prior to any question.

Judge Hinkes: Very well.

Just hold your question, if you will, Mr. White.

Mr. Mathias: Your Honor, we have had a chance to read it now.

Judge Hinkes: You may proceed.

By Mr. White:

Q. What is this document? A. This is a price proposal or a proposal for a private label milk program to Mr. A. L. Shough for their Chicago unit stores.

Q. And who is Mr. A. L. Shough? A. Mr. Shough was a gentleman who headed up the Dairy Department for the Kroger Company at the corporate office or at the head-quarter office in Cincinnati.

Q. And was this proposal transmitted to Mr. Shough? A. Yes, it was.

Mr. White: I offer RBX1-A through 1-J, Your Honor.

Judge Hinkes: Is there any objection?

Mr. Mathias: No objection.

Mr. Curnin: Continuing objection for A&P, Your Honor.

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Judge Hinkes: Very well. The objection is [1094] overruled and this document is received in evidence.

(The document heretofore marked RBX1-A through 1-J for identification was received into evidence.)

By Mr. White:

Q. Mr. Gose, was the offer covered by RBX1 accepted by Kroger? A. No, it was not.

Q. Mr. Gose, I show you what has been marked RBX2-A through 2-N.

(The document referred to as RBX2-A through 2-N was marked for identification.)

Mr. Mathias: Again, may we have a chance to read it before questions are asked?

Judge Hinkes: Very well.

Mr. Mathias: We have read it now, sir.

By Mr. White:

Q. Mr. Gose, what is RBX2? A. This is a proposal to Mr. Shough for private label milk program in Chicago.

Q. For the Kroger stores? A. For the Kroger Chicago unit.

* * * *

[1100] * * *

Q. And was there anyone present at that conversation other than yourself and Mr. Gromer? A. Not to my recollection.

Q. What was the substance of that conversation? A. Mr. Gromer stated that our proposal was not sufficiently attractive for him to make a change in his milk products.

Q. And who was supplying the Gromer stores at that

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time? A. To my recollection, it was the Dean Milk Products that were in the store.

Q. I take it that Borden did not secure the business of the Gromer Supermarkets based on this proposal? A. We did not secure the business.

Mr. White: I offer at this time RBX4-A through J, except for the handwriting appearing on Subpart H.

Mr. Mathias: No objection, Your Honor.

Mr. Curnin: Same objection, Your Honor.

Judge Hinkes: I will receive Respondent Borden's Exhibit 4 in evidence.

(The document heretofore marked RBX4-A through 4-J for identification was received into evidence.)

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【1109】 Q. This would have been a high-volume item?
A. Yes, sir.

Judge Hinkes: Would you like to have a recess at this time?

Mr. White: Could we?

Judge Hinkes: Very well. We will take a short recess.

(A brief recess was held.)

Judge Hinkes: Mr. White?

Mr. White: Mr. Gose, I have shown you this afternoon five proposals submitted by Borden which you have identified.

Are these the only sales solicitations that were made during the period November 1, 1965 to the time you left the employ of Borden?

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Mr. Mathias: Your Honor, I think that question is rather vague.

Judge Hinkes: In what way?

Mr. Mathias: Your Honor, sales solicitation—I don't understand the term "sales solicitation".

Mr. White: I will rephrase the question, if that will help.

Judge Hinkes: Very well.

By Mr. White:

Q. Aside from the five proposals you have identified, Mr. [1110] Gose, during the period November 1, 1965 until you left the employ of Borden near the end of 1968, did you and your sales staff solicit other wholesale customers in the Chicago area to sell them milk and milk products? A. Yes, sir.

Q. Were you doing this constantly? You and your staff? A. Yes; our sales people were constantly doing this.

Q. Mr. Gose, I show you what has been received in evidence as Commission Exhibit 138. A. Yes, sir.

Q. With respect to the Chicago metropolitan region to which that document relates, was Borden also allowing a central billing discount? A. Yes, sir.

Q. And how much was that? A. Two percent.

Q. And that continued on subsequent to January 1, 1966? A. Yes, sir.

Q. Until you left? A. Yes, sir.

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[1120] * * *

Q. I believe you testified, Mr. Gose, that it was during the first half of 1966 that you submitted a quote on private label milk to Kroger, and specifically a Mr. Blair. A. Yes, sir.

Q. I may have misspoke myself, Mr. Gose. Let me state: was that proposal made on brand label, Borden brand

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label, and not on private label? A. I am very sorry. Would you repeat the question?

Q. Was it your testimony that it was some time during the first half of 1966 that you submitted a quote on the Borden brand to Mr. Blair at Kroger? A. Yes, sir.

Q. And the price you quoted, was that better than the price that A&P was paying for Borden brand label milk at that time? A. I don't recall.

Q. What is your best recollection? A. It could have been.

Mr. Mathias: Your Honor, I believe that answer is too speculative and I think it should be stricken.

Judge Hinkes: You are saying it could have been and it could not have been? Is that what you mean?

Mr. Curnin: Let me ask him a few questions, if I [1121] may, Your Honor.

Judge Hinkes: I will strike the previous answer of the witness.

By Mr. Curnin:

Q. Did you have any discussions with anyone within the Borden Company about the quote that was to be submitted to Kroger on Borden brand label prior to your submitting it to Kroger during the first half of 1966? A. I am sure I did.

Q. You didn't prepare the quote? It was Mr. Malone who prepared the numbers, worked up the calculations? A. Yes.

Q. Do you remember discussing with Mr. Malone the fact that the price that was being offered to Kroger at this time was better than the price A&P was paying for Borden brand label milk? A. I don't recall any specific discussion with regard to that question.

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Q. Do you have today a general recollection that the price in fact was better than A&P was paying?

Mr. Mathias: Your Honor, I object. The witness has already stated he did not have any such recollection.

Mr. Curnin: I don't believe that is his testimony, Your Honor and I believe I have a right to probe this point.

【1122】 Judge Hinkes: Let's have the witness' last answer read.

(The reporter read from her notes as requested.)

Mr. Curnin: Although he may not recall a specific discussion, Your Honor, he may nevertheless have a general recollection on the subject and that is what I am asking him about now.

Judge Hinkes: I will allow it.

You may answer.

The Witness: As I recall, Mr. Malone gave recognition to the additional volume that would be obtained if we were to secure the Kroger business and I do recall that recognition was given to that in the proposal that was prepared for Kroger.

By Mr. Curnin:

Q. And by doing so he developed a better price for Kroger on Borden brand label than A&P was then paying?
A. Yes, sir.

Q. You testified, sir, that Mr. Blair informed you that in words of substance he wasn't going to accept your proposal because it was \$100,000 in excess of what they were then paying Dean for its brand label milk—or was it Bowman, sir? A. I don't recall anything other than more than he was currently paying.

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Q. More than he was currently paying to whom? **[1123]**
A. I don't recall that he said.

Q. Do you know what dairy was supplying Kroger during the first half of 1966? A. To my recollection it was the Bowman Dairy Company.

Q. And that figure of \$100,000, was that an annual figure? A. That was on an annualized basis.

Q. Did you offer to reduce your price that you had quoted to Kroger when Mr. Blair told you this? A. I do not recall ever doing anything like that.

Q. Now, during this period, 1966, the first half of 1966, you were in contact with representatives of the A&P Company? A. Yes, sir.

Q. As a result of your conversation with Mr. Blair, did you ever disclose to anyone at A&P at least in regard to one supplier and one competitor that the price you were charging was not competitive and that therefore you would reduce the price being charged A&P on brand label milk? A. No.

Q. There has been marked as RBX1 the July 29, 1968 proposal which was made to the Kroger Company which you, I believe, have testified was not accepted by Kroger.

Judge Hinkes: What date did he mention?

Mr. Curnin: July 29, 1968, Your Honor.

Mr. White: Would you like to see it?

[1124] The Witness: If it is permissible, Your Honor.

Mr. Curnin: If, during the course of my questioning, Mr. Gose, you wish to refer to any document that has been marked in evidence, please let me know.

The Witness: Could you restate your question, sir?

Mr. Curnin: Will you read the question back, please?

(The reporter read from her notes as requested.)

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By Mr. Curnin:

Q. Is that correct, Mr. Gose? A. That is correct.

Q. Did you have a discussion with Kroger at which they told you the reasons why they were not accepting this proposal of July 29, 1968? A. There was a discussion and as I recall Mr. Shough indicated that certain products because of his knowledge of the milk production business that looked unreasonably high to him.

Q. Were these products homogenized milk products? Or the byproducts? A. I don't remember them specifically but they were very definitely in the byproducts category.

Q. Was he saying to you in words of substance then that your price is all right on the homogenized milk but it is too high on the byproducts? [1125] A. Would that be a hypothetical question that I can't answer?

Q. No, I hope it is a factual question that you can answer.

Would you repeat the question, please?

(The reporter read from her notes as requested.)

The Witness: It could be assumed.

By Mr. Curnin:

Q. And what—

Judge Hinkes: Just a moment. What could be assumed?

By Mr. Curnin:

Q. Was that your understanding of what this gentleman from Kroger was saying to you? A. I would like to repeat that the byproducts he indicated were unrealistically high.

Q. Unreality high, did you say, sir?

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Judge Hinkes: Did he offer any objections to the price for homogenized milk?

The Witness: He did not at that time.

By Mr. Curnin:

Q. But he raised objections to the price you were quoting on the byproducts because in his opinion they were unreasonably high? A. They were too high.

【1126】 Q. And was Kroger buying supplied by Dean at this time? A. Yes, they were.

Q. To the best of your knowledge, Mr. Gose, was the price that is quoted in RBX1 for private label, was that price comparable to what A&P was paying for private label at this time in July of 1968? A. I would say it was comparable.

Q. Now, after your discussion with the Kroger representative and some months thereafter, you submitted to them a second proposal dated October 24, 1968, which has been marked here as RBX2-A, which I now show you.

Did Borden in that quote improve the price on private label milk and byproducts from that which appeared in RBX1 on the byproducts in light of Kroger's statement to you that they were too high?

Let me give you two examples, Mr. Gose, and this might speed things up for us.

I direct your attention to RBX1, page C, and the item "cottage cheese" in both the 16 and 32 ounces, and at the same time I direct your attention to RBX2, page H.

Do you have those pages, sir? A. I am not with you, sir.

Q. Mr. Gose, as you look at these exhibits, is it true that RBH1, page C, which I directed you to, and RBX2, page J, have different delivery requirements? 【1127】 One is five-day and one is six-day. A. Yes, sir.

Q. So that in that sense they would not be totally com-

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parable; is that correct? A. It would be very difficult to compare the two schedules because of that reason.

Q. Was it your understanding in submitting to Kroger RBX2, to lower the price on the byproducts so as to overcome the objection that they had raised at the time you submitted RBX1 back in July? A. As I recall that adjustment was made.

Q. I note that RBX2, which is the October '68 quote to Kroger, affords them two pricing schedules or affords them an option.

One is a price based upon Borden dock pick-up, which I assume that they pick the product up at Borden's Woodstock, Illinois plant and the other is a more conventional drop delivery to the stores; is that not so? A. That is true.

Q. Was A&P offered a similar option at this time in October of 1968?

In other words, so they could have a private label price, one based on dropped shipment, or if they so chose, one based on dock pick-up? A. To my recollection, they were not.

【1128】 Q. And had they been, would there have been a substantial saving in the cost, at least in the wholesale price?

Do you understand that question, Mr. Gose? A. I am not sure that I understand it.

Q. I withdraw it.

The figures are in the exhibit.

Did Borden undertake a cost study at the time and prior to its submission of RBX2 to Kroger, to your knowledge? A. I cannot answer that question.

Q. Is it that you don't know, sir, or you don't now recall? A. I don't recall.

Q. So then you don't know whether or not the price that was offered to Kroger in fact encompasses all the cost savings that may have been available to a customer such as Kroger at this time? A. I could not answer that.

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Q. Is it your testimony, Mr. Gose, that you were unsuccessful in selling private label to Kroger even with the quote which you gave them in October of '68, RBX2? A. That is correct. To my knowledge, the business was not secured.

Q. Do you know why? A. I do not know why.

Q. And did White Hen Pantry reject the private label [1129] proposal which you submitted to them in March of '68, which proposal has been marked as RBX3? A. Yes, they did.

Q. And the price that was offered to White Hen Pantry for private label on the half-gallon, was that comparable to the price A&P was paying at that time? A. I don't recall.

Q. Why did they reject your proposal here on private label?

Judge Hinkes: If you know.

By Mr. Curnin:

Q. If you know, sir. A. I do not know.

Q. Did anyone report to you—Mr. Dischner or anyone else in the Borden organization—that the price was rejected because it was too high or that White Hen Pantry didn't think savings permitted switching to private label?

Mr. Mathias: Your Honor, which question is he asking the witness?

Mr. Curnin: I will ask them one at a time, Your Honor.

By Mr. Curnin:

Q. Were you informed by Mr. Dischner or any other representative of the Borden Company that White Hen Pantry had rejected this offer because the price was too high? A. I don't recall.

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【1130】 Q. You don't recall being informed of the reason why they rejected the offer? A. That is correct.

Q. And the Borden Company was unsuccessful in its private label quote to Gromer Fine Foods, which has been identified as RBX4; is that not so? A. That is correct, sir.

Q. Did they actually tell you why they rejected this proposal? A. Yes, sir.

Q. What did they tell you? A. The prices were not sufficiently attractive to warrant making a change.

Q. And to your knowledge was the price quoted to Gromer on half gallon private label comparable to what A&P was paying at this time? A. I could not answer that.

Q. Was Dean supplying Gromer at this time? A. The Dean product was in the Gromer stores at that time.

Q. How many stores did Mr. Gromer have? A. As I recall, approximately five stores.

Q. In September of '68 you testified you submitted a private label proposal to Eagle and that proposal has been identified as RBX5 and that this proposal was accepted by Eagle.

【1131】 Was the price quoted on private label to Eagle comparable to that which A&P was paying at this time for private label?

Judge Hinkes: Private label?

Mr. Curnin: Private label.

The Witness: I would say that the price was comparable.

Judge Hinkes: Is that for the Borden label milk that you were quoting your price to Eagle?

Mr. Curnin: No, Your Honor. This is on private label.

The Witness: It was on private label, Your Honor.

Mr. Curnin: May we go off the record, Your Honor?

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Judge Curnin: Off the record.

(Discussion off the record.)

Judge Hinkes: Let's go back, again.

The proposal that White Hen rejected, was that on private label or on the Borden label?

Mr. White: May he see the document? It is all in evidence, Your Honor.

Judge Hinkes: Oh. I guess, then, I don't have to trouble the witness.

Mr. Curnin: That is RBX3, Your Honor.

Judge Hinkes: Very well.

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【1150】 * * *

Judge Hinkes: Well, this witness is being asked for his understanding, which may not be at all similar to the terms of the contract, and to that extent it is permissible, although what its probative value would be, I don't know.

You may answer the question.

The Witness: My recollection of the terms were that there would be advance ordering, frequency of deliveries, varied with the various areas involved, there would be no credit for returns, unless it was due to faulty manufacturing by the Borden company, there was advance orders, such things as no stamping of the milk and so forth. That is my recollection.

By Mr. Curnin:

Q. And that this represented a change in the manner and method in which Borden had been delivering Borden label milk to A&P stores. A. Yes, I think it definitely changed a number of the conditions of delivery.

Q. And was one of the conditions, Mr. Gose, that the

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milk was to be delivered to a cooler but was not to be placed in the dairy case? A. That is my recollection.

Q. Now, was it necessary for the Borden Company to instruct its personnel on this new manner and method of delivery? A. As my memory serves me, that was covered with our various [1151] branch operating people and in turn it was their responsibility to cover it with the delivery people involved at the respective branches.

Q. Were specific instructions issued by Borden to its branch people as to the instructions that were to be given to its drivers? A. Yes. As I recall—I can't remember dates, obviously—but as I recall, we at our office had meetings with each branch operating manager and I am sure some of his personnel.

Q. For the purpose of instructing him on the new terms and methods of delivery. A. The conditions and terms of the new program.

Q. To your knowledge, did Borden ever permit or encourage its drivers or distributors to vary from these terms and conditions of delivery? A. Absolutely not.

Q. Now, were you ever advised of an instance or an occasion when a Borden driver was doing more for a particular A&P store or its manager in regard to the delivery of private label milk? A. Yes, I remember one occasion where this information reached my desk. I recall seeing Mr. Elmer Schmidt with regard to it, and I recall that it was with regard to one of our deliverymen that was doing the ordering rather than the store personnel, and I recall Mr. Schmidt picking up the phone almost immediately, discussing the matter at the store level with [1152] whoever was involved, and if my memory serves me, the problem was corrected almost immediately. That, for some reason, is quite vivid in my memory.

Q. When did this occur, sir, as best you can recall? A. I have no idea as to when that was.

Q. During the period 1966 through the end of 1968 when

Testimony of Orville Gose

you left, was this the only occurrence that you can recall?

A. It is the only one that I can recall, that I can think of.

Q. And were you the Borden employee who was responsible for the supervising of the manner and method of delivery and if there had been any complaints along these lines, you were the man who would have been apprized of it? A. Yes, I should have been apprized of it because I was the one, either myself or possibly Gordon Tarr, that would have discussed such a matter with Mr. Elmer Schmidt.

Q. If a Borden driver or distributor deviated from the instructions, he had received from the Borden Company as to the manner and method of delivery, he would have been doing so then, in your opinion, in direct contravention of instructions he had received from the Borden company?

A. Yes.

Q. Did you consider Elmer Schmidt a knowledgeable milk buyer? A. I would have considered him a capable buyer, if this is answering your question. I wouldn't consider Mr. Schmidt as being overly knowledgeable with regard to the milk industry, the [1153] dairy industry.

Q. Well, when you first came in contact with Mr. Schmidt, and I believe you testified this was sometime after November 1, 1965, at which time you started as the contact man, so to speak, between Borden and A&P, at that period of time, the latter part of 1965, did you conclude that Mr. Schmidt had a great lack of knowledge about the dairy industry. A. I don't know that I concluded that. I think it was awareness or a feeling on my part.

Q. And did others at the Borden Company have the same feeling at this time, November of 1965?

Mr. Mathias: Your Honor, I object to the form of the question.

Mr. Curnin: I withdraw the question.

Testimony of Orville Gose

By Mr. Curnin:

Q. Did you have discussions with others at the Borden company in November of 1965 at which you discussed Mr. Elmer Schmidt and his knowledge of the dairy industry? A. I did not, to my knowledge.

Q. Did Mr. Schmidt in November of 1965, based upon conversations that you had with him, understand such things as the Federal Milk Marketing Order? A. Your date, I could not answer. I do remember an occasion when the gentleman that was in charge of our production and responsible for the Woodstock plant made a call with me to see * * *

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【1192】 * * *

Judge Hinkes: The White Hen proposal, around March of 1968?

The Witness: I believe so.

Judge Hinkes: And the Kroger proposal in July and October of 1968?

The Witness: The Kroger, sir?

Judge Hinkes: Yes.

The Witness: Yes, sir.

Judge Hinkes: Now, the Kroger proposals were on private label at that time; is that right?

The Witness: Yes, sir.

Judge Hinkes: What was the proposal that you talked with them about in 1965 before the A&P deal went through?

I believe you testified that you spoke to Mr. Blair and that was about private label, was it not?

The Witness: As I recall.

Judge Hinkes: Telling him of your intentions to go ahead with the private label business?

The Witness: Yes, sir.

Testimony of Orville Gose

Judge Hinkes: And if I am correct you testified that Mr. Blair said, "not now; maybe later," or words to that effect?

The Witness: Yes, sir.

【1193】 Judge Hinkes: You approached him then later and if my notes again are correct it was in early 1966?

The Witness: Yes, sir.

Judge Hinkes: And at that time you again broached him on the subject of private label milk; is that correct?

The Witness: Yes, sir.

Judge Hinkes: And once again he said he wasn't interested?

The Witness: That is correct, sir.

Judge Hinkes: Now, then, after that you proposed a price on Borden label milk; is that correct?

The Witness: That is correct, sir.

Judge Hinkes: How much after that? That is, how much after your early 1966 suggestion of private label?

The Witness: Shortly thereafter, sir, to my recollection.

Judge Hinkes: A matter of months or weeks you mean?

The Witness: I would be inclined to think a matter of weeks.

Judge Hinkes: And this proposal was on a price to Kroger for Borden label milk that would have a better than 30 percent rebate from list?

The Witness: Yes, sir.

Judge Hinkes: And how did that compare, if you know, 【1194】 with the A&P Borden label milk price?

The Witness: I don't recall, sir.

Judge Hinkes: You don't know whether that better than 30 percent rebate was lower or higher than

Testimony of Orville Gose

A&P was paying for Borden label milk; is that what you are saying?

The Witness: I don't know for certain. It is possible that it could have.

Judge Hinkes: Could have been either lower or higher?

The Witness: It could have been lower.

Judge Hinkes: It could have been lower than A&P's price?

The Witness: Yes, sir.

Judge Hinkes: Nevertheless, Kroger turned it down; is that it?

The Witness: That is correct, sir.

Judge Hinkes: And it was then that they said that the price is \$100,000 too high or something to that effect?

The Witness: Yes, over \$100,000.

Judge Hinkes: Is there anything else, gentlemen?

If not, thank you, Mr. Gose. You may step down. You are excused.

(Witness excused.)

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Testimony of Harry Archer

June 25, 1973

* * * * *

【1247】 your presence ever discuss with any A & P Representative the price at which A & P intended to, or would, or should sell private label products out-of-store in the Chicago area? A. No, sir, never.

Q. Was there ever any discussion during that time period, either in your presence, or as far as you know, concerning the price at which A & P would sell Borden label products out-of-store in the Chicago area? A. No, sir.

Q. Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P? A. Would you repeat that question so that I can understand it?

(The record was read by the reporter as follows:

"Question: Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P?"

The Witness: The answer is no.

【1248】 Mr. White: That is all, Your Honor.

Judge Hinkes: Mr. McInerney.

By Mr. Inerney:

Q. Mr. Archer, I believe you told us that you had a number of contacts with Herschel Smith with respect to selling Borden products to A & P in various parts of the

Testimony of Harry Archer

country at various times, is that correct? A. Yes, that is right.

Q. To the best of your knowledge, apart from whatever may have happened in Chicago, can you recall any situation, with the possible exception of Chicago, in which A & P gave Borden an opportunity to rebid or resubmit a price to A & P after A & P had received competitive offers? A. No.

Q. Insofar as you are aware, would A & P expect Borden to quote its best price the first time, and in other words, not give Borden—

Mr. Soeffing: Your Honor, I will object to that question. He said "would expect." I think that is asking the witness to make a guess. I think he should ask him what the practice was.

Mr. McInerney: I am talking about a course of dealings.

Judge Hinkes: Ask him with respect to a course of dealings. Ask him what the practice or policy was, or something [1249] of that sort.

By Mr. McInerney:

Q. In general, wasn't it the practice of A & P that Borden would only be able to submit one price and would not get a second bite at the apple if that price was not a competitive one? A. Yes, I think you are right. Please keep in mind though that you are asking—I would have to withdraw my answer. You are speaking of two different levels of responsibility, and this—at the New York level, we just didn't have that type of conversation, so that any response to your direct question that I give you would have to be at our local level, and I could only deal with the policy that we have in our own company.

Q. I am just asking you as a general matter and as

Testimony of Harry Archer

matter of practice, Mr. Archer, wasn't this generally A & P's practice? A. Yes, that is right.

Q. And insofar as you are aware, with the possible exception of Chicago, that was regularly followed? A. That is right.

Q. You did have some discussion with Mr. Herschel Smith—correct me if I am wrong—with respect to private label milk in New York prior to the advent of this Chicago negotiation? A. Yes, indirectly.

Q. Do you recall that Borden made an offer for private label milk to A & P for the New York area? 【1250】 A. Yes, I know that it was made.

Q. And do you recall that the price quoted in New York was based on the price of raw milk plus container costs, processing charges, and delivery charges? A. I am not aware of the detail on it.

Q. In the hope of refreshing your recollection, although the document has been admitted in evidence, I would like to show you Commission Exhibit 23-A, the bottom of the page, and I would like to ask you to read a paragraph commencing "examination of similar costs in Metropolitan New York."

If you would just read that one paragraph down to the end of the quotation.

My question is, sir, whether reading that helps to refresh your recollection that there were prices quoted in New York based on the price of raw milk plus a container cost, processing charge, and delivery charge? A. No, it really doesn't.

Q. Do you know in general what the spread between the price of raw milk and the price that Borden charged A & P for the private label milk in New York was? A. No, I am not familiar with that figure.

Q. Do you know whether the price of raw milk in New York was lower or higher than in Chicago in 1964 and 1965? A. I can't tell you that.

Testimony of Harry Archer

Q. With respect to the private label offer in Chicago, did you **【1251】** or did anyone in your presence tell Mr. Smith or anyone from A & P that the private label prices being offered to A & P in Chicago were not cost justified? A. I am not aware of that.

Q. Did you or did anyone in your presence tell Herschel Smith or anyone from A & P that the private label prices being offered to A & P in Chicago would not be made available to others on proportionately equal terms? A. I am not aware of that.

Q. Do you recall discussing the subject of availability of those prices to others with Herschel Smith? A. Never.

Q. Do you recall a discussion with Mr. Smith concerning the final quotation that was submitted to A & P in early October, 1965? I believe the record shows the date is approximately October 1, 1965. A. I had no conversation with Herschel Smith with reference to that.

Q. Without pinpointing the specific date, sir, do you recall any conversation with him at around that time, perhaps after that time, with respect to this private label quotation in Chicago? A. No, no, I do not.

Q. Do you believe that Herschel Smith or anyone from A & P misrepresented anything to you, or to anyone from Borden during **【1252】** these negotiations for private label milk in Chicago? A. I can only answer a portion of your question. I can say with all candor and honesty that Mr. Smith never did to me. It would be just pure conjecture on my part to answer the latter part of this question.

Q. I am only asking you all of these questions, sir, insofar as you are aware. A. All right. I am not aware.

Q. Do you know whether Borden made private label milk offers to other customers in Chicago, other than A & P, in 1964 or thereafter? A. I believe the record will show that they did.

Q. And were the prices quoted to the other private label

Testimony of Harry Archer

customers similar to those quoted to A & P? A. I am not aware of that.

Q. You have no knowledge either way? A. No.

Q. Sir, you have been shown a number of notes which you identified as being in the handwriting of Mr. Pentz, and which appear to be from the desk pad of Mr. Pentz. As to several of them, you said that was the first time you had ever seen them. My question is, do you recall having seen any of those handwritten notes before? A. No, I don't, unless my initials appeared on them. If you would go back over them and find my initials there, I would have **¶1253** to agree that I had some knowledge of it in passing at the time, but if my initials did not appear there, I would have to say that I did not recall ever seeing any of them.

Q. As a general practice, unless your initials appeared as a recipient of the note, is that the idea? A. That is what I am trying to say.

Q. In other words, the fact that Mr. Pentz may have written a note—I don't have it in front of me—that H.A. did something with H.S., that would not be an example of where you might have seen the note? A. That is right.

Q. Apart from the instance you have described, would you have any independent recollection of having received any of these notes? A. Yes, I think I so testified that I did see several of these notes when they were shown me.

Q. I was trying to do this en masse, but as I recall, the one that you said that of was a typewritten memorandum on which you had written the word "agreed" or some such thing. A. That is right, "agreed" and "good."

Q. Is that the one that you are speaking of? A. That is it.

Q. Are there any others that you can recall? A. Not that I recall.

Q. Is it possible that on the ones where your initials may **¶1254** appear and have been crossed out, that Mr. Pentz was writing to himself—

Testimony of Harry Archer

Mr. Soeffing: I am going to object to that, Your Honor. He said "is it possible?" I think we should find out what the usual course of practice is, not is it possible.

Judge Hinkes: I would have to sustain that objection. The answer would not have any probative value, because I think everything is possible.

By Mr. McInerney:

Q. Mr. Archer, were any of the handwritten notes that we are speaking of, which are entirely handwritten notes from the calendar pad of Mr. Pentz apparently, did you instruct Mr. Pentz to prepare any of those? A. No, I did not.

Q. Mr. Archer, I would like to show you two letters dated October 1, 1965, which have been marked respectively RA and PX-2 and RA and PX-3. Would you please look at those? A. Does this mean this was attached?

Q. Yes, it has been testified. A. I have never seen that before.

Q. You have never seen RA and PX-2, which is apparently a letter from Mr. Tarr to Mr. Schmidt, is that correct? A. Yes, this would appear so.

Q. But is it your testimony that you haven't seen it before? A. That is right, I have not seen it before.

【1255】 Q. Have you seen similar letters, letters similar to that? A. I have not.

Q. When A & P would receive a price quotation from Borden, can you tell us whether it was a practice for Borden to give A & P some kind of a letter of assurance as to the legality of the prices that Borden was offering A & P? A. Yes, I believe that it was, and I think that it was so written or typed on the proposal. I believe that I am correct in that.

Q. And is the kind of assurance that you were just

Testimony of Harry Archer

speaking of an assurance similar to that contained in RA and PX-2? A. I can't testify—

Mr. Soeffing: Your Honor, I must object to that. He has already testified he has never seen these letters before quite emphatically.

Judge Hinkes: I will overrule the objection. Let the witness answer. Is the assurance the same type that this letter—

Mr. McInerney: Or similar, Your Honor.

The Witness: Yes, I think I would respond in the affirmative to that. I presume that there were some instances of State laws that would change the wording in some fashion, but I am not sure of that either.

By Mr. McInerney:

Q. Did you ever advise Mr. Smith that Borden's private label [1256] quotation in Chicago was made for the purpose of meeting competition and would not be made available to others? A. I never did that.

Q. Did you ever have a discussion with Mr. Smith about the Woodstock plant, the new plant that Borden had constructed in Woodstock, Illinois? A. I don't recall specifically, but that Woodstock plant was, of course, a matter of record and a part of very prominent news in the dairy magazines, and so forth, and so forth, and Herschel was interested in that sort of thing, because they were thinking of some processing plants of their own; so conceivably yes, but to the best of my knowledge, no.

Q. In 1964 and 1965, they did not have any processing plants of their own, is that correct? A. The Tea Company?

Q. Yes. A. You are speaking of milk? They had an ice cream plant in Wisconsin, but no milk to my knowledge. No, I don't believe so.

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Testimony of John Szczepaniak

June 26, 1973

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【1280】 * * *

Q. Did you have any supervisory control over these routes, sir, as route foreman? A. No; there was another foreman above me, the regular wholesale foreman, plus there was a man above him also.

Q. Well, were you familiar, in this position, with the various wholesale routes in a general way? A. Yes.

Q. And were you familiar with the major customers located on the various wholesale routes served out of the Hammond branch? A. I wasn't at the beginning, but gradually I learned the different routes over a time span or a period of time; by running special deliveries to this one and that one, I would learn where the stores were and everything.

Q. Were you familiar with the procedures, the delivery procedures, in effect on these various routes? A. If I was to run a route, I would go with the driver and he would show me where the stores were, what door he would stop at, and who he would see and where he would leave the milk, and so on.

Q. Now, as an assistant route foreman, starting in, I believe you said, 1962, what were your duties at this point, sir?

Mr. Schaefer: Your Honor, if I may interject, I don't think it was 1963 when Mr. Szczepaniak said he started as assistant route foreman. I am not sure about that date.

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【1286】 Q. (Continuing) Are you familiar with this document Mr. Szczepaniak? A. No.

Q. Are you familiar with the terms of service outlined in that document, sir? A. You mean the delivery setup?

Testimony of John Szczepaniak

Q. Yes. A. The delivery setup I would be familiar with.

Q. Does this document describe the terms of service and delivery which were in effect in the Hammond area and Gary area in 1966, sir, and later periods? A. In reference to what, sir?

Q. In reference to the general terms of service. A. Deliveries, you mean?

Q. Yes, the delivery-service terms that are outlined therein. A. They were served six days a week.

Q. Was there any requirement, sir, that they had to be served six days a week? A. Yes.

Q. What was this requirement, sir? A. Our union contract, sir, requires six-day delivery.

Q. So that you were not able to give any lesser-number days delivery to any particular customer? A. No less than four, the contract stated.

Q. And what is the six-day week, then? What was the [1287] requirement in this regard? A. Six days delivery —six days a week.

Q. Were all of the large supermarket chains served six days a week? A. All stops was.

Mr. Schaefer: Can we have a time period on that again, your Honor?

Mr. Mathias: I used the term "1966."

By Mr. Mathias:

Q. This answer would have pertained to the time period 1966. Would this condition have continued following the year 1966? A. Yes.

Mr. Dembrow: Excuse me. What condition are we talking about?

Mr. Mathias: The six-day delivery.

Mr. Dembrow: Thank you.

Testimony of John Szczepaniak

By Mr. Mathias:

Q. The six-day delivery requirement continued after 1966? A. Yes.

Q. And was it also in effect in 1965, sir? A. I am sure it was. The best I can remember, we always delivered six days a week—the routes went out.

Q. Now, was there any time in later years when this circumstance changed, when delivery was made on a less-than-six-day-per-week basis? 【1288】 A. Not that I delivered.

Judge Hinkes: Let me understand. You say that this was a six-day delivery program but that the union contract only provided not fewer than four?

The Witness: Six days, no less than four.

Judge Hinkes: So, if I understand it, the union contract would permit as few as four-day delivery program but the practice was a six-day, is that it?

The Witness: Right, sir. They all had six-day delivery.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Now, in connection with sales to the supermarkets, both chain and independent, how were deliveries at the store level generally handled?

Mr. Dembrow: Excuse me. Are we talking about all supermarkets?

Mr. Mathias: Your Honor, I would prefer my question to be answered. I would rather not be interrupted by A and P counsel.

Judge Hinkes: Yes; I don't think we should engage in these questions between counsel. If there is an objection, state it in the acceptable form and I

Testimony of John Szczepaniak

will rule, but otherwise let us have the question and go on. You will have your opportunity to explore the matter further to your heart's content on [1289] cross examination.

Mr. Mathias: Would the reporter read the question.

(The reporter read the pending question.)

The Witness: What do you mean—"how were they handled"?

By Mr. Mathias:

Q. How was the delivery made in general? A. Well, to the cooler.

Q. And this would be true in the case of delivery to an A and P store? A. Right.

Q. Would it be true in the case of Burger's Market? A. Right.

Q. Would it have been true in the case of the Joseph Tittle and Son stores? A. Right, sir.

Q. Would it have been true in the case of Model Food Center? A. Right.

Q. Would it have been true in the case of Wilco Food Center? A. Yes.

Q. Would this have been true in the case of Wallies Market? A. Yes.

Q. And would it have been true in the case of South Town Market? A. No; South Town, we used to service the case.

[1290] Q. What do you mean by "service the case"? A. They had no backup facilities other than maybe one or two extra cases of milk, so, consequently, what milk we brought in, we would bring in no more than what would fit in the case, and the driver would do this.

Q. And this was a different service than you performed for the other customers I mentioned? A. Yes.

Testimony of John Szczepaniak

Q. What about Dick's Market? Did you deliver to a cooler there? A. The case there was also serviced by the driver. He had a little more backup room, so we left a little extra in there, too.

Q. So in the case of Dick's Market and South Town, an extra service was performed that was not performed for the others? A. Yes.

Q. Now, did the Borden Company, during this period, 1966 and following, have a policy concerning preordering of products and advance orders? A. The A and P used to give us advance orders.

Q. Did any of the other markets which I have mentioned provide you with advance orders, sir? A. No, sir.

Q. During this period, 1966 and following, did the Borden routes in the Hammond area have any provision concerning the **[1291]** return of products? A. The only products that we were allowed to pick up were damaged merchandise and sour merchandise in date.

Q. What do you mean by "in date," Mr. Szczepaniak? A. Where the date has not yet expired.

Q. This would be the normal shelf life of the products? A. Right.

Q. So that if the product were spoiled before the time when it was scheduled, the lowest shelf life, well, then you would take the return? A. Send it to the lab for analysis.

Q. Now, was this policy in effect for all of the customers we have named previously? A. Yes.

Q. Do you recall a time when the Borden routes would accept returns on any products? A. They might have done this years ago prior to my getting involved with it, but I personally have no knowledge of it.

Q. So all the time that you were associated with the wholesale routes in the Hammond area, the policy on returns which you have described was in effect? A. As far as I personally can tell you what I personally had been involved with, yes.

Testimony of John Szczepaniak

Q. And was this the Borden Company policy? A. Except damaged merchandise and merchandise bad in date.

【1292】 Q. So that, in taking this position you were following the orders of your superiors in the Borden Company? A. That is what way it was told to me to do.

Q. Now, Mr. Szczepaniak, you mentioned, I believe, that at some times you drove the routes for special deliveries, is that correct sir? A. Right.

Q. Now, in the year 1966 and following, did Borden's Hammond branch have any policy concerning the frequency and necessity for special deliveries? A. Frequency or necessity?

Q. Were special deliveries made as a general rule? A. If a store called up and they needed extra milk and we had it, I would take it to them.

Q. Was this a very common occurrence, Mr. Szczepaniak? A. Nothing of any regular nature. You never knew.

Q. In the case of the scheduling of your route, was the route arranged so that the stops at the various stores would be made at the time most convenient to the Borden driver? A. The drivers set up their stops by their areas that they serve. We had one route in the Hammond, East Chicago area, and we had another one in the Gary area in the south and another one east of that. The drivers scheduled the stops the most efficient way possible for themselves so they wouldn't be backtracking and this and that.

【1293】 Q. Mr. Szczepaniak, during the period 1965 and 1966, what was the method of payment of the drivers in the Hammond branch area? Were they paid on an hourly-wage or commission basis or just what was the method of payment? A. Weekly rate plus commission.

Q. And what portion of their pay would the commission be, approximately? A. Depending on the number of points they run through the month.

Q. The commission would vary in accordance with the number of— A. Sales.

Testimony of John Szczepaniak

Q. Would the commission be a major portion of their salary in most instances, Mr. Szczepaniak? A. The bigger routes would receive more than the smaller routes.

Mr. Mathias: Your Honor, I have only a couple of more questions of this witness. Then I would like to try to identify a few exhibits through him, and I think if we would take a brief recess at this point where we could line those up, it would expedite things.

Judge Hinkes: Very well. We will take a short recess at this time.

(A short recess was taken.)

【1294】 Judge Hinkes: You may continue, Mr. Mathias.

By Mr. Mathias:

Q. Mr. Szczepaniak, you mentioned that in the case of the A&P stores there was a pre-ordering of the product. In the case of the other stores such as Burger and Title stores, how was the ordering handled in those cases? A. By the driver himself. He had what we would call a buildup of each product in his book, a daily buildup and he would built the product up through that.

Q. In other words, he knew the approximate level that each— A. Of sales.

Q. Of sales that each store required? A. Right.

Q. And how would he determine then how much was needed in a particular store? A. By the buildup in his book from prior deliveries.

Q. He would check to see what was on hand, check against his book and what difference was required? A. Right.

Q. Now there was also a mention of some discussion of special deliveries. Did A&P stores in the Hammond area

Testimony of John Szczepaniak

ever get special deliveries after the private label program went into effect? A. Yes.

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【1308】 * * *

By Mr. Dembrow:

Q. Mr. Szczepaniak, you stated, I believe, in your direct testimony that you became involved with the wholesale routes in the Gary Hammond area around August of 1965 after you had been on country routes for a while. A. That is right.

Q. And in this connection you served A&P stores in the vicinity described, is that correct? A. At no regular basis. I had no route.

Q. Right, but from time to time you served A&P stores? A. Yes, if a need arose.

Q. And I believe you stated you remember serving A&P stores when they were receiving private label milk. A. Yes.

Q. Do you recall ever serving any A&P stores in this area when they were not receiving private label milk? A. Not that I can really remember. It has been so long.

Q. I believe, Mr. Szczepaniak, that you stated that among the stores you served only the A&P stores pre-ordered. Is this correct? A. That is right.

Q. And during the occasions when you actually delivered to the A&P stores were the orders ready for you when you arrived 【1309】 at the store? A. Whenever I was on a route, yes.

Q. In regard to the other stores, stores other than A&P, I believe you stated it was necessary for the driver to complete the order when he delivered to these stores. A. That is right. He would make up an order.

Q. In connection with this making up of the order by the driver, was it necessary for him to go into the store to check the stock, the products that were in the display case? A. As a count.

Testimony of John Szczepaniak

Q. Mr. Szczepaniak, during the occasions that you delivered to these stores, did you furnish the stores other than A&P stores with promotional material, signs and various other paper type material? A. The independents I know for a fact—I remember distinctly—whenever they had a sale on it was available to them if they wanted it.

Judge Hinkes: What was available to them?

The Witness: The signs, the sales signs, sir.

By Mr. Dembrow:

Q. Did you furnish this type of promotional material and signs to the A&P stores? As best you recall? A. I can't really recall whether or not it was.

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Testimony of Herschel Smith

June 27, 1973

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【1350】 * * *

Q. I believe there came a time when A & P initiated a private label brand in the New York area? A. Yes, sir.

Q. When was that? A. It started in November, 1964, in the New York area in the New York side of the Metropolitan area.

Q. And was this a project of your office? A. Yes, sir.

Q. In 1964, after you had taken over the national purchasing of milk, did you suggest to anyone else that they explore private label? A. Yes, I did.

Q. How did you do that? A. In late 1964, there was a meeting at Headquarters of the seven Purchasing Directors. They were the seven Divisional Purchasing Directors.

Q. For dairy products? A. They were the Purchasing Directors of the Divisions. Do you understand?

Q. Yes. A. They were brought to New York, not for this purpose, but for a meeting of Purchasing Directors and this just accidentally coincided with the introduction of A & P brand milk in the New York market. While they were in New York, this **【1351】** project was shown to them.

They were made familiar with the fact that A & P had just changed to private label milk in New York, and the figures that pertained to it were shown to them and they were told that they should go back and talk to their Unit Buyers, the 32 people under their various jurisdictions, and look into private label in each area to see whether or not it would be to the Company's advantage to consider it.

Q. Subsequently, did they do so? A. Yes, sir.

Q. Who was the Purchasing Director in Chicago? A. That was Ira Bartels.

Q. And Mr. Bartels was informed of and made familiar with the A & P private label program in New York? A. Yes, sir.

Testimony of Herschel Smith

Judge Hinkes: Let me understand. You say that Ira Bartels was the Purchasing Director for the Chicago—

The Witness: For the Middle Western Division, yes, sir.

Mr. McInerney: Which is situated in Chicago, Your Honor.

Judge Hinkes: Yes.

It was your instruction to him to talk to the Chicago Unit Buyer about it?

The Witness: And St. Louis and Kansas City and [1352] Milwaukee. The people under his jurisdiction, yes, sir.

Judge Hinkes: And Mr. Schmidt would be such a person?

The Witness: That is right.

By Mr. Stone:

Q. In the following two years, did the greater part of the A & P chain commence private label milk programs? A. There were many of them.

Q. Might it be said that this meeting bore fruit? A. Yes, that is a fair inference, I guess.

Q. And might it be said that the Chicago Inquiry was part of a nationwide inquiry of the A & P Company? A. Yes, sir.

Q. And during the subsequent two years, can you name a few of the major cities in which A & P did commence private label milk programs? A. It is a little hard to collect my thoughts on that in relation to the dates that they occurred. I can tell you some of the Divisions that subsequently got into private label but I am not too sure just what you have in mind as to the chronological order.

Q. I wasn't particularly interested in the chronological order. I wanted to find out if a number of Purchasing

Testimony of Herschel Smith

Directors had, in turning back to their people, and commenced private label programs as a result of their inquiry. A. Up in the New England area, Boston went into private label * * *

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【1361】 * * *

Q. During this period between February and August, did Mr. Bartels ever request, or did you ever offer him any information concerning Borden's comparison or concerning Borden's offer in New York for comparative purposes? A. I don't believe I had any dealings with Bartels about private label milk from February to August.

Q. What happened in August, then? A. In August, Mr. Bartels called me and said he had a private label offer from the Borden Company and described it to me on the telephone, indicated that it had an alleged saving of \$410,000 over the prices that he presently was paying for milk, and he told me that it was his opinion that the offer was not a satisfactory offer.

For example, it didn't seem to justify us giving up the Borden brand label and taking on the cost of performing the services that were being eliminated, and it didn't give us the return privileges that we were enjoying on the Borden brand, return products to them.

Also, we didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retail for some period of time, that would be at our expense instead of Borden's expense. It didn't seem like the offer was sufficiently attractive to justify going into private label.

Q. Did you ask Mr. Bartels to send you any information? 【1362】 A. No.

Q. Did you suggest that Mr. Bartels do anything? A. Yes, I suggested again that he solicit offers from other qualified dairies, and he said he would do it.

Testimony of Herschel Smith

Q. Mr. Smith, I hand you Commission Exhibit for identification 34, which has been marked for identification, and ask you to review this document, if you would please.

Have you reviewed the document? A. Yes, sir.

Q. Does this document refresh your recollection as to any request by Mr. Bartels, or any offer by you, to supply him with Borden's New York bid?

Mr. McInerney: Your Honor, I don't think there has been any need expressed to have his recollection refreshed on that, but the question has been put and I don't want to impede the examination.

Judge Hinkes: Quite right. I don't think the witness said anything about not remembering, but I think you can ask him about that question once again, if you wish.

The Witness: In my previous answer, I told you that I did talk to Mr. Bartels in August, and this is August, and I presume that this is some kind of a notation that resulted from our telephone conversation, yes, sir.

* * * * *

【1366】 * * *

Q. And what did you do at that point? A. Of course, I was surprised to see a Borden re-bid because this is not the customary way for a Buyer to operate, but nonetheless, the offer did seem like it saved more money. His recommendation was that he and his President and his Sales Director agreed that this was the one they wanted to go with and—

Judge Hinkes: Mr. Smith, you say that you were surprised at the new bid?—

The Witness: Yes, sir.

Testimony of Herschel Smith

Judge Hinkes: —by Borden, and I think your language was because that was not the way a Buyer acted; and A & P is the Buyer, isn't it?

The Witness: Yes.

Judge Hinkes: What was the way that A & P acted that was different?

The Witness: The Borden Company had already bid in August and had made—in other words, he asked all the dairies for bids. Borden came in in August with theirs, and we discussed [1367] that it was not a very satisfactory offer. Then subsequently, the Bowman offer came in which was a more attractive offer.

The customary way would be to accept the Bowman bid as our new milk Supplier. He had a better proposition than Borden, but somehow in giving the Borden Company notice of our change of suppliers, apparently they were allowed to make a re-bid.

Judge Hinkes: In other words, you were surprised that Bartels had received, or had solicited as the case may be, a new and better bid from Borden?

The Witness: Yes, my instructions to Mr. Bartels were simply to tell them that we had a better—that we had a new milk Supplier and that we would like to have an estimate of the date when the new Supplier could take over the operation, but instead of that, somebody prevailed on somebody else to accept a new offer.

By Mr. Stone:

Q. And, sir, what did you do at this point? Did you recommend approval? Did you okay it? A. It seemed to have all of the qualities that were required of a milk offer. The recommendation of the people out there was something that you had to consider. Mr. Vogel was an

Testimony of Herschel Smith

officer of the Company and these were his Purchasing and Sales Directors who recommended it. The offer was quite evidently cost-justified.

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【1376】 * * *

A. It is not my handwriting, but above Mr. Vogel's name it appears that somebody has written that he is the director of sales.

Mr. Stone: Offer CX-263-A through Z-15 with the exception of the handwritten notations.

Judge Hinkes: Is there objection?

Mr. McInerney: No objection, Your Honor.

Judge Hinkes: Mr. White?

Mr. White: Nothing special, Your Honor.

Judge Hinkes: 263 with the sublettering is received as offered.

(The document referred to, heretofore marked for identification Commission's Exhibit CX-263-A through Z-15, was received in evidence.)

Mr. Mathias: Your Honor, I might note for the record that Complaint Counsel had not seen this document before and have not had time to prepare copies and copies will have to be made and supplied to Your Honor and to the other parties.

Mr. McInerney: I would like to note, if I may, Your Honor, just to tie this into the proposed exhibits, the covering letter is a copy of the original, the file copy of which has been marked as CX-67 for identification. The comparison next to it has been marked as Commission Exhibit 65 for identification. * * *

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Testimony of Herschel Smith

【1399】 Q. Then just two further questions:

Sir, how long have you been with the Great Atlantic & Pacific Tea Company? A. Since 1926.

Q. And are you presently receiving any sort of pension from the Tea Company? A. Yes, I am.

Mr. Stone: No further questions, Your Honor.

Judge Hinkes: Cross examination, Mr. McInerney?

Cross Examination by Mr. McInerney:

Q. Mr. Smith, you mentioned that in about 1964 A&P commenced a general inquiry into the possible advantages of private label milk in various parts of the country. A. Yes, sir.

Q. Was there any particular occasion for that inquiry? A. Yes, there was.

Q. Can you tell us what that was? A. Well, we observed that our competitors in a large way were selling private label milk.

Q. Can you name some of those competitors? A. Yes. Safeway sold private label milk that they produce themselves. Kroger sold lots of private label milk, some of which they produced and some of which they bought. National Tea's Stop & Shop, Food Fair, Acme, Winn Dixie.

【1400】 Q. Jewel? A. Jewel.

Q. Any others that you can remember offhand? A. Well, there were many others. Bohack in New York, for example, had private label milk. They are a small chain but they did have private label.

So I caused a survey to be made throughout the United States of A&P's milk buying practices and sent out an inquiry to find out what we were paying, what our competitors were doing, and got it back, and as I looked at this it was evident to me that A&P was probably paying too much for its milk, and in New York where I was located

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it was quite obvious to me that we were paying Borden too much for milk in New York.

Q. Why do you say that? A. Well, before we went into private label milk in New York in November of 1964 they came in to me in May of 1964 with a price reduction that was about a million-dollar price reduction, and said that they wanted to lower their prices in New York so that A&P would be more competitive. Now, this price reduction was not solicited and this followed a similar action about a year previous to that in the spring of '63 in which they then also reduced their milk prices substantially. For example, I recall in 1963 they reduced the gallon price by 18 cents a gallon in the City of New York.

And I recall, too, at that time that we were paying Borden [1401] 23 cents a quart for milk in New York, and some chains, King Cullen for one, were selling milk out of store for 21 cents. And about that same time in the spring of '64 a dairy came into to visit with me, the owners of the dairy, called Glenn & Mohawk. They are located in Fultonville, New York, and they identified themselves as the supplier of private label milk in New York City to Bohack and asked if we would be interested in considering them as a supplier of private label milk for A&P. Their offer to me at that time was to supply milk at 17½ cents a quart and they mentioned at that time that during the flush time of the year when the raw milk supply was flush and the prices were lowest that the milk price in New York might go down as low as 16½ cents instead of 17½ cents.

Some people in our company had seen a study of the Risden Dairy plant in Detroit—I think they were inquiring as to whether the plant should be bought. I think they were trying to sell it. They looked at their books and they were making something like 30 or 50 percent in their milk business. They were our suppliers, and we were their principal customer.

Testimony of Herschel Smith

So to answer your question, yes, I was fully convinced that A&P's milk buying practices were not what they should be and that we should look into them promptly.

Q. And among other places that you looked into private label I believe you have testified was in New York. Is that correct? A. That is correct.

【1402】 Q. And in New York with whom did you speak in the Borden Company with respect to private label? I think you have said this before but I just want to tie it in. A. Well, I spoke to Mr. Archer about that but also I think I contacted Mr. Brennan oftener. He was the President of the Dairy Seal operation in New York, and I believe he came in oftener and was the responsible party largely in the City. Archer was his superior, and so Archer often-time sat in with Brennan and talked about New York City.

Q. And ultimately I think you have told us some time in November of 1964 Borden became the supplier of private label milk to A&P in the New York area, is that correct? A. In the New York, District of New York—Metropolitan New York, that is right.

Q. Now, do you recall in approximate terms at least the prices at which Borden supplied private label milk to A&P in New York? Was there a formula of some kind or how did that work? A. Well yes, there was a rule of thumb that was given to me by the dairies at that time as I was getting into the dairy business. They had some rule of thumb which was a guide as to whether or not the milk price was substantially what it should be or what it could be and it was what they called a 2-2-2 formula.

Q. What does that mean? A. It means simply that roughly speaking you can take the 【1403】 raw milk price that the farmer gets and add 2 cents for the carton, 2 cents for the processing overhead and profit, and 2 cents for delivering it to the store and you have got an approximate cost figure based on a normal dairy's operation.

Q. Now, what I had asked you previously, Mr. Smith,

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was what did Borden actually charge you? Did they actually charge you on the basis of the 2-2-2 formula? A. Yes, that is what it turned out to be, yes.

Q. That is per quart of milk? A. Per quart of milk, that is right.

Q. And how did it work out on the half gallon and gallon? A. Well, the half gallon carton was less than two quart cartons and so it was a lesser figure. The overhead I believe was double, the half gallon was double the quart, and the delivery probably was double the quart.

Q. In other words, was the spread between the raw milk price and the price that Borden was charging A&P 12 cents on the half gallon or something less than 12? A. Something less than 12 cents.

Q. On the half gallon. A. On the half gallon. It wasn't exactly double. It was a differential downward from 2 quarts. You saved a little money in the half gallon.

Q. And what about the gallon? A. Well, the gallon, there is still a further differential.

【1404】 Q. In which direction? A. Downward direction because you have now only one single wall and there is a saving in delivery somehow in the gallon size too.

Q. Now, following the New York private label arrangement, I believe you told us that Mr. Archer spoke to you about the possibility of negotiating a private label arrangement for Chicago between yourself and Mr. Archer in New York, is that correct? A. Yes, that is right.

Q. In discussing that subject with you did Mr. Archer mention anything about the Woodstock plant in Chicago? A. Oh, yes.

Q. What did he say? A. Well, when this New York private label deal started in New York it was in November of 1964 and it was at that time that this Woodstock plant opened in Woodstock, Illinois. This was a new, modern plant that the Borden Company had built out there and Archer talked to me, every time he talked to me he talked

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about this plant and how great it was. He said it was the most modern, largest plant in the world. It had labor-saving devices in there, push button equipment where you push the button and the plant operates all by itself. He said this plant is going to have low cost production, below anything there was, and he suggested that this will give us low price **【1405】** milk out there in Chicago which we can pass on to A&P and pass on to our other Borden customers, and he wanted me to come out and see it because he just didn't think that I quite comprehended how great this plant was.

Q. Did you go out to see it? A. No, I didn't go out to see it. He wanted me to fly to Chicago and drive on up there and I didn't have the time to make the trip.

Mr. McInerney: Now may we have what has been marked Commission Exhibit 263?

By Mr. McInerney:

Q. I believe you have identified this already, Mr. Smith, as the submission that was given to you by Mr. Bartels about the date that it bears, October 1, 1965, if I recall correctly. A. Yes, that is right.

Q. Now, in testifying with respect to that I believe you started to describe that document and never quite finished your description of it and I will come to that a little later on, but if I recall correctly, thereafter one of the first questions Mr. Stone asked you this afternoon was whether, after receiving that and after taking various steps, you ultimately approved the acceptance of the Borden proposal. A. Yes, sir.

Q. Now, what were the various steps that you took between the time of receipt of that and your acceptance of the Borden **【1406】** proposal? A. The first thing that I needed to clear up was the letter of availability that came with this offer.

Testimony of Herschel Smith

Q. If you will excuse me just one moment, there is another document that has been marked here as Respondent A&P Exhibit 2. Now, is that the document that you refer to as the letter of availability and does that document also appear as part of Commission Exhibit 263? A. Yes.

Q. I'm sorry, I interrupted your answer.

Would you please read back where the witness was when I asked him that question?

(The reporter read from her notes as requested.)

By Mr. McInerney:

Q. I apologize for the interruption. Would you continue? A. Yes. Well, this letter states from Borden to Elmer Schmidt, you have our price quotations dated September 21, 1965 for milk, cream, and other dairy products in several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.

Now, there was no letter of availability came with this offer and we customarily get from each milk supplier a letter of availability to assure us that the offer being made to us is in fact available to the other customers on a proportionate equal terms. I called Harry Archer and talked to him about **【1407】** this—

Q. Was your discussion on the telephone or in person? A. Well, I called him and told him about this and he, as he often did since he was only five minutes walk away from my desk, he walked over to my desk and we discussed it there.

Q. Will you tell us what was said by each of you on that occasion? A. And I told him that this was not a satisfactory letter of availability as far as I was concerned because availability is not mentioned in the letter. And he said, "Well, yes. This is a letter of availability. This is your assurance that this offer is being made available to

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other customers on a proportional, equal basis and, further than that, that this letter protects A&P in all events. Generally, a letter of availability means just that, but this is an all-encompassing letter." And he inferred that we were lucky to get such an all-inclusive document.

Q. I'm sorry. I am not sure what your all-inclusive terminology means. Can you tell us? A. Well, a letter of availability would simply assure us that the company, the dairy, the seller, is going to make this available to his other customers and so that it would be—that would be our assurance, but this would seemingly hold us harmless in all events, whatever they may be, so you have—I can't tell you what that might ever include, but it will be [1408] a letter of availability and anything else that may arise. So he touted this to me as being an especially fortunate document as far as I was concerned.

Mr. White: I would like to make a motion to strike the answer insofar as the witness' interpreting the language and not giving us the conversation that actually took place between himself and Mr. Archer.

Judge Hinkes: Well, let's be sure we understand exactly what Mr. Archer told you as distinguished from what you may have understood him to mean. Would you tell us once again, Mr. Smith, exactly what he told you when you said that there was no letter of availability?

The Witness: Well, I have to paraphrase it, Your Honor, because I don't have the verbatim conversation.

Judge Hinkes: As nearly as you can.

The Witness: But the gist of the message was that this is a letter of availability and this assures A&P of the availability to Borden's other customers, and he used such words as they were to lead me to believe that this is more than—

Testimony of Herschel Smith

Mr. White: I object, Your Honor. Tell us what—

Judge Hinkes: Tell us what words he used or the approximate words, if you can't remember the identical words.

The Witness: Well, it would seem that "All-encompassing" would be the kind of words that he used here.

【1409】 Judge Hinkes: Did he represent to you that this was the same as a letter of availability and even more than a letter of availability?

The Witness: That is right, sir.

Judge Hinkes: Now, what language of his did he use to convey that impression to you as best you can remember?

The Witness: I would say that he used words like "all-encompassing".

Judge Hinkes: Very well.

The Witness: My objection to Mr. Archer at that time was "Why don't you just give us a letter of availability like you always do," and so he was apparently defending—

Judge Hinkes: Well now, what did he answer when you said that?

The Witness: That this is a letter of availability and it is my assurance that it is available to the other customers.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. And did he also tell you in words substantially that this was a representation that A&P would be held harmless in all events? A. That is the gist of what he was talking about.

Mr. Mathias: I object to that.

Testimony of Herschel Smith

Mr. White: I object to that. Again it is the gist.
【1410】 Now he is trying to put words in the witness' mouth, and the witness has something to add to the conversation and I thought he had concluded it.

Mr. McInerney: The witness himself had used the words "hold harmless" previously. I did not invent those words. I think the record will so show.

Judge Hinkes: Well, you have to be very careful, Mr. McInerney. You must remember this witness is a former employee of your client.

Mr. McInerney: Yes, Your Honor.

Judge Hinkes: And under those circumstances your freedom of cross-examination has to be somewhat limited so that perhaps what Mr. White might ask him is not exactly the same thing that you would be permitted to ask him.

Mr. McInerney: Your Honor, I want the witness to understand, and I hope Your Honor will instruct him, that it is not incumbent upon him to reconstruct verbatim what happened; if he can give us the substance of the conversation that that is sufficient.

Mr. White: And that is what his Honor asked him and that is what he gave.

Judge Hinkes: Yes, that is what he had given. Of course if we try to elaborate upon the answer we run into some very great dangers by suggestion, if nothing else.

Mr. Stone: Your Honor, in this light I think it is
【1411】 becoming clear that Mr. McInerney is beginning to put in a defense and that he is using the witness, which is obviously a friendly witness. Thus I would suggest that it would be appropriate to limit Mr. McInerney to the type of questions which might be asked on direct examination.

Testimony of Herschel Smith

Mr. McInerney: Your Honor, I am not. If the suggestion is that this was leading the witness in some way, I picked up some language that he used and asked him if that was part of the substance of the conversation. That is all.

Judge Hinkes: Well, let me see if we can get this back on the track again.

Mr. Smith, once again, tell us what Mr. Archer told you in the words that he used, or in the substance of the thought that he conveyed. What did he tell you about this letter?

The Witness: Well, I believe my problem at that time was a lack of a letter of availability. When it was determined that this was a letter of availability I was satisfied—

Judge Hinkes: Well now, wait. I don't think you are following my question. You were concerned about what you thought was a missing letter of availability?

The Witness: Yes, sir.

Judge Hinkes: You asked Mr. Archer about a letter of availability, why he did not supply it?

The Witness: Yes, sir.

【1412】 Judge Hinkes: Now then, he answered what?

The Witness: That this is a letter of availability, this is my assurance.

Judge Hinkes: Now, did he add anything to that observation? Did he say anything more about that letter than that it was a letter of availability?

The Witness: Yes. He indicated to me that this is more than a letter of availability.

Judge Hinkes: And what did he say it was in being more than a letter of availability? If anything,

Testimony of Herschel Smith

The Witness: Because Borden would hold us harmless.

Judge Hinkes: Mr. Archer represented to you that Borden would hold A&P harmless, is that what you are saying?

The Witness: In connection with these prices, yes, sir.

Judge Hinkes: In connection with these prices. And that that was the effect of that letter?

The Witness: That is right.

Judge Hinkes: Very well, you may continue, Mr. McInerney.

【1413】 By Mr. McInerney:

Q. Did Mr. Archer tell you how this letter came to be prepared? A. He said it was prepared by the Borden lawyers and he made some statement about the fact that naturally Borden was an honorable company like A & P is an honorable company and they wouldn't do anything illegal in an operation as important as this one.

Q. Can you presently recall anything else with respect to that conversation? A. No, I don't believe there was anything further on that conversation.

Q. Now, again going back to Mr. Stone's question about after taking various steps you finally accepted this quotation, what was the next step? A. I sent it to the Legal Department for their approval.

Q. And after that? A. Then I called the Chicago people out there, Bartels, to tell him that this was approved and he could accept it, he could put it into motion.

Judge Hinkes: Did you call or did you write?

The Witness: I called and confirmed it, sir.

Testimony of Herschel Smith

By Mr. McInerney:

Q. Now did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to [1414] see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them? A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small.

Q. And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right? A. That is right. The document itself looks to be a much more attractive, considerably more attractive offer.

Q. Which document, sir? A. The document that Mr. Bartels sent with this letter shows that the Borden offer is substantially better than the one from Bowman.

Q. In other words, the document prepared or sent to you by Mr. Bartels indicates that the Borden offer is more attractive than the Bowman offer? A. Yes, sir.

Q. And yet, if I understood you correctly, comparing the unit prices, the difference was infinitesimal at best? A. Yes.

Q. Now— A. It was a matter of mills. Maybe "infinitesimal" isn't a [1415] good word there. It was small, mill differences.

Q. And on the quarts, for example, the Bowman quotation was better? A. Was actually lower, yes.

Q. Now, did you at that point in time examine each of these quotations in detail to make your own analysis as to whether the Bowman quotation or the Borden quotation was better from the point of view of A & P? A. No, I did not.

Testimony of Herschel Smith

Q. Have you done so since at my request? A. Yes.

Q. And can you tell us what the result of that analysis is?

Mr. Stone: Your Honor, I would object. I believe the documents speak for themselves.

Mr. McInerney: Your Honor, I don't see how there can be any debate about this. I think the witness' answer will show that the documents do not quite speak for themselves.

Judge Hinkes: I will overrule the objection, but let me understand, Mr. Smith. You originally said that the Borden bid was much better than the Bowman.

The Witness: Yes, sir.

Judge Hinkes: Whose language was that? Who thought so? You or Mr. Bartels?

The Witness: Well, he said it to me, and the figures at the bottom of the line here look like, yes, that is right, [1416] it looks from the document he sent me that, yes, that is right.

Mr. McInerney: Would you identify the document you are speaking of?

Judge Hinkes: That is 263?

The Witness: Yes. It is this 263.

Mr. McInerney: Is it 263-B?

The Witness: 263-B is the summary of the one versus the other one, yes, sir.

Judge Hinkes: And then you have subsequently made a closer examination of the figures and a comparison, is that correct?

The Witness: Yes, I have.

Judge Hinkes: At the request of Mr. McInerney?

The Witness: Yes, I have.

Judge Hinkes: You may continue, Mr. McInerney.

Testimony of Herschel Smith

By Mr. McInerney:

Q. Mr. Smith, 263-B is what you were referring to before, when you said that despite the fact that the unit prices appear to be very close there was something there that made the Borden bid seem better than the Bowman bid, is that correct? A. Yes.

Mr. McInerney: I am sorry. There was a pending question and then there was an objection. Would you read back that question?

(The question was read by the reporter.)

【1417】 The Witness: In closer examination of these documents we found, I found, that the Bowman bid was based on a higher raw milk price than the Borden bid, and I also found that the Borden bid was based on a 3.4 butterfat product, whereas Bowman's bid was on the basis of the 3.5 butterfat product.

By Mr. McInerney:

Q. Can you tell us what the significance of those differences is? A. Well, my method here was to change them both to the same raw milk price and change them both to the same 3.5 butterfat price, and in doing that in all three cases—the quarts, the half gallons and the gallons—the Bowman bid was a lower bid than the Borden bid when they were both put on a comparable basis from the standpoint of the cost of the raw milk and the butterfat content of the finished product.

Q. Is it customary in the dairy industry that a customer like A & P can obtain either 3.4, 3.5, 3.6 or whatever butterfat content is legal that the customer wishes? A. Yes.

Q. And so with those adjustments, which offer was the better offer from the point of view of A & P?

Testimony of Herschel Smith

Mr. Stone: Again, Your Honor, I think the documents speak for themselves.

Judge Hinkes: No. I will allow the witness to [1418] answer.

The Witness: The Bowman bid has lower prices and I would say that it is the bid that should have been accepted.

By Mr. McInerney:

Q. Was the Bowman bid comparable to the Borden bid on the subject of whether private label was being offered and only private label being offered? A. No, I think both bids were predicated on supplying private label and the brand label. They would both be offered and stocked to some extent in the stores and the Bowman label was quoted to Mr. Bartels at the same prices as the A & P label, whereas the Borden label was quoted as a substantially higher figure.

Q. Well, my question, sir, was: examining the two quotations that you received—

Mr. Stone: Excuse me, Your Honor, I would move to strike the last answer on the basis that the witness indicated it was sheer speculation. He said, "I think—" and then went on.

Mr. McInerney: Your Honor, I really think this is improper impairment of the examination. We are trying to get the witness' best recollection, and I will clarify this if there is anything unclear about it.

Judge Hinkes: You may go on. I will deny the motion to strike. We will let the answer stand and argument may be made on the probative worth of such an answer.

[1419] Mr. McInerney: Your Honor, I don't know quite where we are. I am just going to ask Mr. Smith to continue in his own words.

Testimony of Herschel Smith

The Witness: Well, at this late date it is evident to me that if this document had been prepared and analyzed properly at the time, the Bowman bid would have been the more attractive of the two.

By Mr. McInerney:

Q. But you were speaking before the interruption about the two quotations before you being for private label milk, as I recall. A. Yes

Q. My question was: Were they both for private label only? A. No, they were for private label and their own respective advertised brands, the Bowman brand for Bowman and the Borden brand for Borden.

Q. In the case of Borden, was there a difference between the price being offered for the Borden brand and the private label? A. Yes, there was.

Q. In the case of Bowman, was there any difference between the price being offered for the Bowman brand and the private label? A. No, they were both the same.

Q. In other words, from the document before you, the Bowman quotation, that quotation is for those prices whether you took private label or Bowman label, is that correct? **[1420]** A. That is correct.

Q. But that is not true of the Borden quotation on private label? A. That is also correct.

Q. Now, did you ever discuss with anyone from Borden what A & P's out-of-store price would be on milk or dairy products in Chicago? A. No, never.

Q. Did anyone from A & P in your presence ever discuss that subject with anyone from Borden? A. No, sir.

Q. Does Borden still supply milk to A & P in Chicago? A. No, sir.

Q. As of when, if you recall, was that discontinued? A. Within the last two years, less than two years.

Testimony of Herschel Smith

Q. And why? A. A better quotation was received from Dean Foods.

Q. I am sorry, I didn't hear the end of that. A. A better quotation, a better offer, was received from Dean Foods.

Q. Did Mr. Archer in the conversation that you had with him with respect to this letter that you have been describing as the letter of availability, did he ever mention meeting competition with respect to this Borden quotation? A. Never.

* * * * *

【1439】

A. Yes. It is my custom to send them a xerox copy of this kind of material so that wouldn't necessarily interfere with the conversation with Mr. Archer.

Q. What is your best recollection as to when you talked to him: at the beginning or the middle or the end of this period that you have described? A. It would have to be an estimate on my part. There is just no way I could reconstruct it. I would think it would be promptly, but not necessarily.

Q. Well, had you heard from the Law Department before you talked to Mr. Archer? A. Well, there again, I believe I talked to Mr. Archer before I talked to anybody from the Legal Department.

Q. So at least that gives us some sequence to it.

Now, you said you telephoned Mr. Archer. Would you tell us what was said in that telephone conversation? Did you invite him to come over? A. It would have been a factual statement to the effect that "I have received this offer from your people in Chicago and attached to it is a letter that doesn't give me a letter of availability, and I would like to talk to you about it," and so, as is customary with him, he came over and talked about it at my desk.

Q. Did he come right over? A. Yes, he did.

Testimony of Herschel Smith

【1440】 Q. He responded relatively immediately to your call? A. Yes.

Q. And how long was your conversation with him in your office? A. I don't believe that took very long.

Q. Well, did it take 15 minutes? A. Probably 15 minutes.

Q. And who was present besides yourself? A. The two of us. Nobody.

Q. Did you ever reduce to writing the substance or any part of this conversation? A. No, I didn't.

Q. Would you tell us again exactly as best you can and in the sequence that you remember it, what was said? A. I told Mr. Archer that this letter that came in with this offer from Chicago was not a letter of availability as we customarily get. And he assured me that this was a letter of availability and he told me that this was more than a letter of availability.

Q. Anything further? A. No. That is the substance of it.

Q. I see. There is nothing you would like to add to that?

Mr. McInerney: I assume—

Mr. White: I don't want an informative objection here. We have had enough answers.

* * * * *

【1445】 * * *

We don't have to take two successive recesses with an interval of only two questions in between. That is hardly an expeditious use of our time.

We will take a very short recess at this time.

Mr. Stone: Thank you.

(Brief recess.)

Judge Hinkes: Mr. Stone.

*Testimony of Herschel Smith**Redirect Examination by Mr. Stone:*

Q. Mr. Smith, you mentioned in connection with the testimony you gave at Mr. McInerney's behest that you had conducted an examination at a later time of the Borden bid and the Bowman bid, and had drawn certain conclusions. A. Yes, sir.

Q. And that this was done at Mr. McInerney's specific request? A. Yes, sir.

Q. Was that study made in any way in connection with this litigation or the allied litigation?

Mr. McInerney: I am not sure the witness knows what the allied litigation is. Perhaps we could just drop that.

Judge Hinkes: Let's separate that if we can.

Mr. Stone: In this litigation?

【1446】 The Witness: This difference started to be revealed as we studied this document carefully. There are many pages here. And the inconsistency of the raw—

By Mr. Stone:

Q. I asked you when the study was made.

Mr. McInerney: "When was the study made?" Is that the question?

Judge Hinkes: Yes.

Mr. Stone: That is what I said, yes. When was the study made?

Judge Hinkes: The study which led to his realization that the price was based upon a higher raw milk cost and a higher butterfat content.

Mr. Stone: And at Mr. McInerney's behest.

The Witness: Yes. I am not sure what the date was. Probably within the last eight months.

Testimony of Herschel Smith

Mr. Stone: Thank you.

No further questions, Your Honor.

Judge Hinkes: Let me understand something, Mr. Smith. You got Commission Exhibit 263 from whom?

The Witness: From Ira Bartels.

Judge Hinkes: And you got that back in 1965?

The Witness: That is correct.

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Testimony of Elmer Schmidt

July 9-10, 1973

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【1667】 * * *

Q. But the Middle Western Division did take in more territory than the Chicago Division? A. Yes, sir.

Q. At the time there was a Middle Western Division, was the Chicago portion always a portion of this Middle Western Division? A. Yes, sir.

Q. Within the Middle Western Division, what was the chain of command through to the New York headquarters? A. The Chicago unit was responsible to the Middle Western Division and of course the Middle Western Division in turn was responsible to New York. Each department within the Chicago unit had a counter department within a divisional office and so into headquarters as well.

Q. You stated prior to 1969 you were the head buyer for the Chicago unit? A. Yes, sir.

Q. When did you start in this position, sir? A. In August of 1964.

Q. Would that be about the beginning of August? **【1668】**
A. It is my recollection it was the early part of August, yes, sir.

Q. During this period of time you have stated that there were counterparts of the division of the unit departments at the division level. Who was your counterpart at the division level during this period of time? A. It was Mr. Ira R. Bartels.

Q. What was his title, sir? A. Divisional director of purchases.

Q. As head buyer for the Chicago unit, what were your responsibilities? A. Basically as the head buyer for the Chicago unit, I was responsible for the procurement of

Testimony of Elmer Schmidt

merchandise for resale in our stores. This has many facets and products.

Q. You were responsible for the purchase of all of these products? A. I had a measure of responsibility for the purchase of all of these products.

Q. By measure, I take it you had other buyers working under you? A. Yes, sir.

Q. In the case of dairy products, was there a dairy buyer or did you handle this personally? A. As far as procurement of dairy products is concerned, except for cheeses, with the exclusion of cottage cheese, I was * * *

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【1679】 * * *

Mr. Mathias: That is the only relationship mentioned so far.

Mr. McInerney: The word "association" is vague.

Judge Hinkes: Do you know how long the buyer-seller relationship existed between A&P and Borden?

The Witness: I know it was for many years.

By Mr. Mathias:

Q. In this period 1964-1965, in the terms of A&P's retail sales of fluid milk and milk line products, approximately how much business was involved in the milk and milk product business of A&P? Again, this would be in 1964 and 1965.

Mr. McInerney: I am not sure I understand the question. Is this in terms of percentage of sales?

Mr. Mathias: In dollar amount.

Mr. McInerney: If the witness understands the question, I have no objection.

The Witness: I would estimate that we were purchasing approximately \$125,000 of milk products from the Borden Company.

Testimony of Elmer Schmidt

By Mr. Mathias:

Q. \$125,000? A. A week.

* * * * *

【1691】 * * *

Q. Mr. Schmidt, did Commission Exhibit 14 and Commission Exhibit 18 with various subparts collectively constitute a quotation on private label milk and dairy products for the entire Chicago unit? A. I would believe that they are covered, yes, sir.

Q. Mr. Schmidt, I hand you Commission Exhibit 21-A through U and ask you if you are familiar with this document, sir? A. Yes, sir.

Q. Have you seen this document before, Mr. Schmidt? A. To the best of my recollection it seems to be the type that I did see before, yes, sir.

Q. Do you know under what circumstances you had seen this document previously? A. No, I do not recall the specific circumstances.

Q. What is it, sir? Do you recall that? A. I believe that the distinction between the two—

Q. Between 18 and 21? A. Between 18 and 21, Exhibit 21 seems to be more complete in giving the quotation for certain areas, depending on the number of deliveries per week.

Q. CX 21 was basically a revision of CX 18. Is that the case, sir? 【1692】 A. I believe I would agree with that, yes, sir.

Q. Do you know whether or not Mr. Tarr would have delivered this document to you? A. Most likely, he did.

Q. At any time during the negotiations, you have mentioned that you dealt primarily with Mr. Tarr. Did you have dealings with anyone else at the Borden company?

Testimony of Elmer Schmidt

A. I have no recollection of anyone other than Mr. Tarr being at my desk but I know on occasions Mr. Minkler was at my desk in 1965 and I recall specifically one time when Mr. Joe Malone was at my desk but I have no specific recollection because of the time element involved here as who came on what date with whom and for what purpose.

Q. Do you recall the occasion on which Mr. Malone visited with you? A. The one occasion I recall where Mr. Malone was with Mr. Tarr was where he made a presentation, if you care to call it that, of a cost comparison distribution system, Chicago-New York.

Q. You don't recall any other conversations you had with Mr. Malone? A. I do not recall any specifically other than that one.

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【1706】 AFTERNOON SESSION

1:30 P.M.

Judge Hinkes: On the record.

You may continue, Mr. Mathias.

Elmer R. Schmidt resumed the stand and testified further as follows:

Direct Examination by Mr. Mathias (Resumed):

Q. I hand you Commission Exhibits 40, 41, 38 and 39. Would you review those, please.

Referring to Commission Exhibits 40 and 41 for identification which appear to be copies of the same memorandum, one signed and one unsigned, can you identify these documents, sir? A. I believe the unsigned one was part of the files maintained in my department. The one that was signed was the one that was forwarded to Mr. Bartels with the quotations.

Q. When you mention quotations, those are the quotations referred to in the memorandum. Would those be Commission Exhibits 38 and 39? A. I would have to see those again.

Testimony of Elmer Schmidt

Q. Those are in front of you, sir. A. It is my recollection they might have been these.

Q. Do they appear to be the attachments to this memorandum? A. It would be my recollection that they would have been attached.

【1707】 Q. Referring to CX-41, there is handwriting on CX-41 in two places. Ignore the handwriting in the lower left hand corner. It is just a reference to a Commission file, but in the middle of the sheet, middle of the page, there is a handwritten notation one word underlined. Can you identify the handwriting thereon? A. Yes, Mr. Mathias, that is my handwriting.

Q. What is the word? A. The words is "insufficient."

Mr. Mathias: I offer CX-41, 42, 38 and 39 in evidence.

Mr. McInerney: No objection.

Mr. White: Your Honor, I would like to ask a few questions.

Judge Hinkes: Very well.

Voir Dire by Mr. White:

Q. Mr. Schmidt, when did you place the word "insufficient" on CX-41? A. It occurred after the 16th and after a conversation with Mr. Bartels. I do not recall the specific date.

Q. But after you had forwarded CX-40 to him? A. Yes, sir.

Mr. White: That is all right now, your Honor.

Judge Hinkes: 38, 39, 40 and 41 are received.

【1708】 (The documents referred to, heretofore marked for identification as CX-38, 39, 40 and 41 were received in evidence.)

Judge Hinkes: Off the record.

Testimony of Elmer Schmidt

(Discussion off the record.)

Judge Hinkes: On the record.

By Mr. Mathias:

Q. Mr. Schmidt, I hand you Commission Exhibit 45 for identification and Commission Exhibit 46D through F for identification and Commission Exhibit 47 for identification and Commission Exhibit 48A through I for identification and ask you to familiarize yourself with those documents, sir. A. I have read them, Mr. Mathias.

Mr. McInerney: Excuse me a minute, I have not.

By Mr. Mathias:

Q. Mr. Schmidt, referring to Commission Exhibit 45 for identification, whose handwriting appears on this paper, sir? A. This is mine.

Q. What was the occasion for preparing this note which appears to cover a span of time from August 18 to October 12, 1965? A. This is a personal memo that I prepared for myself recording the conversations I had with Henry Soldwedel or his office concerning any interest he might have in quoting on private label milk.

Q. Mr. Soldwedel was with what company? **【1709】** A. Wanzer Dairy.

Q. Did Mr. Soldwedel or Wanzer ultimately submit a quotation? A. No, they did not.

Q. Mr. Schmidt, referring now to Commission Exhibit 46D through F for identification, can you identify these papers? A. Yes, I can, Mr. Mathias.

Q. What are they? A. Basically they are my small attempt to prepare forms that might be used by me in the solicitation of quotations for private label. At that particular time we did not have any forms, none were at the desk when I took it over. To the best of my knowledge none was available from higher echelon.

Testimony of Elmer Schmidt

Recognizing that the Borden Company's format and preparation and submission of the quotation to me had some merit, I merely had my secretary copy the paragraph designation, so to speak, from the Borden documents and put in this form.

The product list, of course, I devised myself from our standard list of items. After I prepared them, I placed them in my file and never did use them and they remained there, of course, until you gentlemen saw copies.

Q. In your contacts with other dairies, did you request data along this general format from the various dairies?
A. It is not my recollection that I used this identical format, no, sir.

Q. Referring then, Mr. Schmidt, to Commission Exhibit 47, 1710 can you identify this document, sir? A. Yes, sir, this is a letter that I sent to our financial department in our headquarters in New York City, as you will note, requesting a Dun and Bradstreet report on Sidney Wanzer Dairy.

Q. Commission Exhibits 48 A through I is the Dun and Bradstreet report you received as a result of that request?
A. Yes, sir.

Q. Mr. Schmidt, in addition to Wanzer, what other dairies were contacted concerning the supply of private label milk to the Chicago unit of A&P? A. I contacted Bowman Dairy, Dean and Hawthorn Melody.

Q. Approximately what period of time was this contact made? A. Approximately early August of 1965.

Q. I call your attention to Commission Exhibit 45 again, your handwritten memorandum concerning Wanzer Dairy and ask if this would refresh your memory in this regard? A. It is August of 1965—perhaps not as early as I indicated it was.

Q. Did you contact all at approximately the same time?
A. Yes.

Testimony of Elmer Schmidt

Q. After reviewing CX 45 would it be your opinion this was approximately August 18, 1965? A. It is in the general area of the 18th, yes, sir.

Mr. Mathias: I offer CX-45 in evidence.

【1711】 Mr. McInerney: No objection.

Judge Hinkes: CX-45 is received.

(The document referred to, heretofore marked for identification as CX-45 was received in evidence.)

By Mr. Mathias:

Q. Mr. Schmidt, did you receive offers from any of these other companies that were contacted in mid-August of 1965? A. Yes, I did receive the quotation from the Bowman Dairy Company and we did receive a quotation from Dean. However, it was for the Indiana territory only.

Q. I hand you Commission Exhibit 50A through V and ask you if this is the offer which you received from the Bowman Dairy Company? A. Yes, sir, it is.

Q. I hand you Commission Exhibit 51A through C for identification and ask you if this is the offer you mentioned from the Dean Company for northern Indiana? A. Yes, sir.

Q. Mr. Schmidt, were you interested in an offer for the northern Indiana stores only? A. No, we were not, Mr. Mathias.

Mr. Mathias: I offer Commission Exhibit 50A through V and 51A through C in evidence.

Judge Hinkes: Received.

【1712】 (The documents referred to, heretofore marked for identification as CX 50A through V and 51A through C were received in evidence.)

Testimony of Elmer Schmidt

By Mr. Mathias:

Q. Mr. Schmidt, prior to seeking quotations from other dairies, did you inform the officials of the Borden Company that you were going to seek other bids for this business? A. Yes, sir, we did.

Q. Subsequent to receiving the offer from the Bowman Company, did you inform Borden that you had received a competitive bid below the price they had offered? A. No, sir.

Q. Mr. Schmidt, I now hand you Commission Exhibits 62A through 62-Z2 and 56A through X and ask if you are familiar with these two documents, sir? A. Yes, sir.

Q. Are you familiar with both of these documents? A. Yes, sir.

Q. Do you recall having received both of these documents from Borden, sir? A. I recall specifically the document dated September 21. I know that our organization—I say our organization, but by my department—received a document dated September 14 and subsequently seen by me, of course.

Q. Mr. Schmidt, was the document dated September 21, 1965, [1713] that is, Commission Exhibit 62 with sub parts, the final offer of the Borden Company? A. Yes, sir, it was.

Q. This was tendered to you on or about September 21? A. Yes, sir.

Q. Was this delivered to you by Mr. Minkler and Mr. Tarr on or about that date? A. Yes, sir.

Q. Your answer was yes? A. Yes.

Q. I hand you Commission Exhibit 65A through C for identification and I ask you if you can identify this document? A. Yes, sir, I can identify them.

Q. Referring to Commission Exhibit 65A for identification, Mr. Schmidt, whose handwriting appears thereon? A. That is my handwriting.

Testimony of Elmer Schmidt

Q. Does that include all of the figures that have been penciled in as well? A. Yes, sir.

Q. Commission Exhibit 65B and C seem to be approximately two copies of the same thing. Were these prepared by your office, sir? A. Yes, sir.

Mr. Mathias: I offer Commission Exhibit 65A through C into evidence.

【1714】 Mr. McInerney: I don't have a copy of C, but if it is a duplicate, I see no reason for two of them.

Mr. Mathias: Let me make a brief check to see if they are identical. If they are, we will just offer A and B.

They do seem to be identical, so I will amend complaint counsel's officer to include only Commission Exhibit 65A and B.

Judge Hinkes: 65A and B are received.

(The document referred to, heretofore marked for identification as CX 65A and B were received in evidence.)

By Mr. Mathias:

Q. I hand you Commission Exhibit 65A and B for identification. Mr. Schmidt, and I ask you to familiarize yourself with this document. I am sorry it is in cut up form, but this is the way we received it from A&P. A. Yes, sir, this is a document that I wrote to Mr. Bartels at my home in Libertyville and sent on into his office.

Q. This was prepared on September 28, 1965, was it, sir? A. Yes, sir.

Mr. Mathias: I offer CX 66A and B in evidence.

Mr. McInerney: No objection.

Judge Hinkes: Exhibit 66 is received.

Testimony of Elmer Schmidt

(The document referred to, heretofore marked for identification as CX 66A and B were received in evidence.)

* * * *

【1720】 *By Mr. Mathias:*

Q. Mr. Schmidt, your handwritten notation at the bottom of Commission Exhibit 70A indicates that service of private label from the Borden Company will begin on November 1st. Is that in fact when service did commence under your private label arrangement with Borden? A. That is my recollection.

Q. That would be November 1, 1965? A. Yes, sir.

Q. Mr. Schmidt, I hand you Commission Exhibit 75A through J which is already in evidence and I note on a number of papers there are handwritten notations in the margin. I wonder if you could tell me whether or not you can identify the handwriting? A. That is my handwriting.

Q. I think there is some on subsequent pages, too.

I note on Commission Exhibit 75A and B there are handwritten notations. Is all of that in your handwriting, too, sir? A. Yes, it is, Mr. Mathias.

Q. I note also on Commission Exhibit 75I and J that certain stores or certain towns' names have been lined through. Do you recall whether or not you were the one who lined out these particular names? A. I don't recall whether I did or not.

* * * *

【1727】 * * *

By Mr. Mathias:

Q. You had identified the figures appearing there above in the circled area as being the handwriting of Mr. Witzke. Can you tell whether or not the handwriting at the bottom of the line attached to the bottom of that circle is that of Mr. Witzke? A. Yes, sir.

Testimony of Elmer Schmidt

Q. It is the handwriting of Mr. Witzke? A. Yes, sir.

Judge Hinkes: Commission Exhibit 103 is received.

(The document referred to, heretofore marked for identification as CX 103D through F was received in evidence.)

By Mr. Mathias:

Q. Mr. Schmidt, in your dealing with Borden, did you request any special formula or specifications for the milk or dairy products to be supplied under the private label? A. It is my recollection that when we first discussed private label that I indicated to them that the quotation should be developed on the basis of advance order system.

Q. I am talking about the formula for the product now, the butterfat content of the milk, the curd or acidity of cottage cheese, chocolate milk formula, and so on [1728]
A. No, sir.

Q. There was no request for any special product according to A&P's specifications? A. No, the only comment I recall in that regard was we certainly wanted the product to meet the minimum legal requirements of the city of Chicago and any other community that we had stores in that they would be servicing.

Q. Borden was already servicing the greater portion if not all of this territory, was it not? A. Yes, sir.

Q. Presumably its products meet the legal minimum specifications in all those areas already, is that not true?
A. To the best of my knowledge that is true.

Q. Is it your belief you would be receiving the same products under the A&P label that Borden put under its own label? A. I don't recall that I knew what Borden's specifications were for products under their own label. It

Testimony of Elmer Schmidt

is my recollection that I indicated to them that the minimum legal standard should be met for the A&P label.

Q. In your dealings with any of the other dairies contacted, did you request any other specifications of them? A. No, sir, I did not.

Q. It was on this same basis—as long as it met the legal minimum specifications in each of these communities, that was all right? [1729] A. Yes, sir.

Q. In November of 1965 and the period immediately thereafter, when A&P introduced private label milk and dairy products into the store, did it reduce the price of the private label products? A. To my recollection, we did not.

Q. Following the beginning of purchases of private label milk and dairy products from the Borden Company in November, 1965, and subsequently thereto over in the next year or two, did you inquire to see if Borden's prices were being made available to other of its customers in these market areas on the Borden label or private label?

Mr. McInerney: Could I have that question read back, please. It is a little complicated.

Mr. Mathias: I will strike it and rephrase it. It got a little involved.

By Mr. Mathias:

Q. Following November, 1965, did your office inquire to see if the price which Borden had granted to you on private label had been made available to its other customers in these market areas? A. I do not recall that I made any direct inquiry, no, sir.

Q. Did you request Borden at any time that they supply you with their published prices and published discounts for the areas covered by your Chicago unit? A. No, sir, I did not, and I believe at that point in my [1730] experi-

Testimony of Elmer Schmidt

ence as a buyer of dairy products I would have recognized that there was no such thing as a published price.

Q. Did Borden in this period, November, 1965 and 1966 sell private label to any other chains in the Chicago market area? A. Again, may I ask, Mr. Mathias, if you will repeat the time element here.

Q. In late 1965 and 1966. A. It seems to me that in 1966, 1967—perhaps more like 1967—Mr. Gose who was calling on us at that time indicated that he had acquired or the Borden Company had acquired a new private label account, but the time element is vague in my memory.

Q. Do you recall who that account was, sir? A. It is my recollection that it was the Eagle Stores.

Q. They were primarily down in the southern area of Illinois, were they not, sir? A. No, sir, they had stores in the northern section of Illinois—Rockford, Waukegan area.

Q. In connection with that private label arrangement, is it possible that this occurred in the middle or later part of 1968?

Mr. White: I object to whether it is possible.

Judge Hinkes: Rephrase your question.

By Mr. Mathias:

Q. Do you presently recall exactly or approximately the date on which Mr. Gose notified you of this private label arrangement? A. I do not have an accurate recollection of the time of the [1731] year.

Q. Mr. Schmidt, subsequent to November, 1965 and through the period 1965 and 1966, did you have occasion to keep track of the milk volume of sales out of the A&P stores in the Chicago unit? A. The Borden Company supplied us with the total sales figures by brand by weeks.

Q. Do you recall, sir, whether during the period 1964, 1965 and 1966 that A&P's volume of milk sales was declin-

Testimony of Elmer Schmidt

ing through this period? A. Through the period of 1965-1966?

Q. Starting in 1964 and on through 1965 and 1966? A. It is my recollection that I was aware that our milk sales were declining along with our general sales volume, yes, sir.

Q. Sir, are milk and dairy products an important line in your A&P grocery stores? A. Yes, sir.

Q. Why is that, sir?

Mr. McInerney: Your Honor, I am going to object to continuing questions along this line in that I think as there has been previous testimony there is a dichotomy in A&P between the buying and selling function and there is a completely separate chain of command with respect to both. This witness is not on the merchandising side of the business. I don't think he is qualified with respect to the sales functions.

【1732】 There will be opportunity, I think, for Mr. Mathias to inquire with respect to that if he needs to, but I think we have already given him certain admissions with respect to the importance of milk and dairy products.

Mr. Mathias: This witness was not only the head buyer, but he was a member of the Executive Committee of the Chicago unit and from his description of the Executive Committee, it would seem that one of the purposes of this committee was to keep each of the departments informed to developments in the various departments, and this would be a very important part of his duties as a buyer to be aware of this type of information.

Mr. McInerney: We have not established what they have done. We only established what they might have done.

Testimony of Elmer Schmidt

Judge Hinkes: I will let you develop this on cross examination.

Can you answer the question, Mr. Schmidt?

Mr. Mathias: Would you repeat the question, please.

(The question was read by the reporter.)

The Witness: Yes, they are important.

By Mr. Mathias:

Q. Why is that? A. As I indicated in earlier testimony, our purchases amounted to approximately \$125,000 per week.

Q. Going back to the time when you took over as head buyer in the Chicago unit, you stated that you were responsible for **【1733】** the overall purchases of the Chicago unit at that time.

Mr. Schmidt, in this period of late 1964 and 1965, did the A&P stores in the Chicago unit carry private label products under most of the lines of merchandise such as canned goods, frozen foods? A. Yes, sir. We had good representation of private label in most categories in the grocery section of our stores.

Q. Mr. Schmidt—

Mr. McInerney: I think I am going to object to the continuing use of words like "most" unless there is some definition of it. I don't know that this witness is qualified to say what percentages were, and so on, of these various lines.

Mr. Mathias: Your Honor, there were no percentages mentioned, and the witness as the head buyer in charge of purchasing the broad line of products for the Chicago A&P stores certainly should be aware of what products are going into

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them and I believe his answer was appropriate and adequate.

Judge Hinkes: His answer may be sufficient for your purposes. If that is the case, we will let it stand there. If there is going to be much more of critical importance to the answer he gives, then I would suggest you go into the question of percentages.

By Mr. Mathias:

Q. Mr. Schmidt, were you aware in 1964 and 1965 and 1966 of the identity of the major competitors of A&P in the Chicago area? [1734] A. In a general way, yes, sir.

Q. Who would these be? A. Jewel Tea, National, Kroger, High-Low, Certified Group—those, in my opinion, would be major competitors.

Q. Did Borden supply any of these competitors with private label milk and dairy products? A. Not to my knowledge.

Q. Do you know whether or not Borden supplied any of these with Borden labels? A. I would be drawing on a hazy memory if I could come with a reply.

Q. We don't want you to make any guesstimates.

In the course of your determination as to who you should approach for bids on the private label business of your Chicago unit, was it necessary for you to become familiar with the identity of the larger dairies in the Chicago area? A. I made no special effort to become acquainted with the size of the dairies in Chicago. I had already had some knowledge of the sizeable dairies, merely by having resided in that area for 15 years.

Q. On the basis of your observation, both as a resident and as a dairy buyer for the A&P, who in your opinion were the leading dairies in the Chicago market area in size?

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Mr. White: I object, your Honor. There is no proper foundation laid for this witness. He has purchased from [1735] one company; otherwise, he is a householder.

Mr. McInerney: I object also, your Honor.

Mr. Mathias: I believe the witness' own documents and the facts in this case indicate it was necessary for him to determine who was capable of supplying the A&P volume and in this regard plus his own long experience in the market, I believe he is qualified.

Judge Hinkes: Why don't you approach it in a different vein. He testified he made certain contacts or attempted to. I think he should be asked why he selected those.

By Mr. Mathias:

Q. Mr. Schmidt, it has been noted on the record that you contacted Wanzer Dairy, Bowman Dairy, Dean Foods as well as Borden. Were there any others you mentioned? A. Hawthorn Mellody.

Q. Were these all the companies you had contacted in the course of your private label negotiations? A. These were the only ones I contacted, yes, sir.

Q. What was the basis of your selection of these particular dairies? A. It is my recollection that basically we selected those because of their capability of supplying our stores with milk. That was the basic criteria.

Judge Hinkes: Did their size indicate to you their capability?

[1736] The Witness: Yes, sir.

Judge Hinkes: Was their size the largest in the area?

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The Witness: May I ask you to repeat that question.

Judge Hinkes: Was their size the largest in the area? Or were there larger ones that you did not contact?

The Witness: They were the largest in the area. There was one other area that we did not contact which I recognized as sizeable and that was the dairy called the Country Delight. Country Delight is owned by Certified Grocers and they are a wholesale cooperative. From what I recall knowing about Country Delight at that time, we could not have purchased dairy products from them because we were not an independent retailer that was buying groceries from Certified.

By Mr. Mathias:

Q. Mr. Schmidt, you have stated at various times Mr. Tarr apprised you of sales volume in connection with your purchases from the Borden Company. I show you Commission Exhibit 165A for identification and ask you if you have ever seen this document or a similar document before, just referring to the first page? A. I have no specific recollection of having seen this document, although by its very nature it is likely that I did see it.

Q. You did see similar documents that were prepared and submitted to you by Mr. Tarr during the course of your tenure as head buyer for A&P? **【1737】** A. These statistics here or volume figures are shown on an annual basis. Therefore, I don't have the specific recollection although it does say sales to the Great A&P Tea Company. Again I would most likely assume it was shown to me, but I don't recall it.

Q. I show you Commission Exhibit 163 for identification and ask if you can recall having seen this document pre-

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viously? A. No, here again my recollection of seeing this very document back in that time slot is very vague.

Q. Do you recall, Mr. Schmidt, during this period of time 1967 through 1969 Mr. Tarr discussing with you or other Borden officials, discussing with you at various times the decline in volume of milk and dairy products purchases by the A&P Company? A. I have no recollection of any specific conversations with them on that subject. However, it was certainly common knowledge to me and I am sure to them one of the barometers of overall sales volume, of course, is dairy sales.

Q. The dairy sales were declining during this period of time in the A&P stores of the Chicago unit? A. Yes, sir.

Q. Mr. Schmidt, I now hand you Commission Exhibit 91A and B and 92A through C for identification and ask you if you can identify these documents, sir? A. Yes, sir.

* * * * *

【1753】 * * *

Q. Did you complete your college education, sir? A. No, I did not.

Q. And between the time that you commenced employment with A&P, and up to the time that you became the Chicago Unit buyer, in August 1964, what had been your experience in purchasing dairy products? A. I had no experience at all.

Q. Now, during your direct testimony you described various negotiations for private label milk in Chicago. Throughout these negotiations and even thereafter, did you ever discuss this private label arrangement with Mr. Herschel Smith of New York Headquarters? A. No, I did not.

Q. You were also asked in your direct testimony a number of questions about the Executive Committee of your Chicago Unit. Did that Executive Committee participate in the private label negotiations? A. No, they did not.

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Q. Did they participate in reaching the decision to accept the Borden private label offer? A. No, sir.

Q. Did they participate in the decision as to the price at which private label milk would be sold out of the A&P stores? A. No, sir.

【1754】 Q. I believe you told us about certain discussions you had with Mr. Tarr of the Borden Company with respect to private label milk. Did you in those discussions describe to him any formula or basis on which you wanted to receive a private label quotation? A. Yes, I did. Basically, I indicated to him that the formula should be predicated on the current cost of raw milk and should be stated in the quotation to us, and it certainly should include the other factors that would go into the final figure on a unit item basis, such as the cost of procurement, packaging, processing, delivery, overhead and profit.

Q. Now, did you ask for a breakdown of these various costs? A. No sir, I did not ask for a specific breakdown. I merely asked that they be considered and be made part of the figure.

Q. And thereafter when you requested quotations from other dairies, did you request them on the same basis? A. Yes, sir.

Q. Now, did you ever tell Mr. Tarr or anyone else from the Borden Company that you were not going to seek quotations from any other dairies, for this private label milk? A. No, I did not.

Q. I think in your direct testimony you were shown an exhibit which I believe is CX-14, containing a February, 1965 quotation from Borden for private label in their Chicago Calumet area.

Without showing you the exhibit, do you know that there was such a document? A. Yes, I recall.

【1755】 Q. Now, what was your reaction to that quotation? A. Mr. McInerney, do you have reference to the first quotation which covered the Chicago Calumet area?

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Q. Yes sir, in February of 1965. We can dig out the document, if you would like. A. No, I can visualize it, Mr. McInerney. However, I have no specific recollection concerning my impressions or reaction of it.

Q. Well, what did you do next, on receipt of that quotation? A. It is my recollection that I most likely discussed it with Mr. Bartels. However, my recollection in that specific area is faded.

Q. Now, that was a quotation solely for the Chicago Calumet area. Did you subsequently request a quotation on private label milk for the entire area that would be covered by the Chicago Unit? A. Yes, I did even actually ask for that kind of a quotation.

Q. And again without referring to the exhibits, unless you would prefer to do so, can you give us the approximate time when you received the quotation which would cover the entire area? A. As I recall, Mr. McInerney, that final, first quotation was delivered to me approximately May 25th.

【1756】 Q. Now, do you recall when, between the February 9 quotation, and the late May quotation, you asked Borden to give you the more complete quotation for the entire area? In that range of time, approximately when would it have been? A. Again I missed the point of your question, Mr. McInerney. Would you mind repeating it?

Q. Well, I think I am only not referring to the documents, Mr. Schmidt, in order to expedite it, and I will be glad to go back and show you the documents. But I think we have seen that there was a Chicago Calumet quote. A. Right.

Q. On or about February 9, 1965, and I think you told us that there was a quotation on the other areas in the Chicago Unit, sometime in late May, I think you said May 25th of 1965. A. That is right, yes sir.

Q. Now, did you ask for the quotations for the other areas, closer to the February 9 date or the May 25th date?

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A. That is my recollection that I did ask for the other areas much prior to May 25th, yes sir.

Q. And do you recall approximately how long it took to get the rest of the area's quotation? A. It is my recollection that it took too long. I can't specifically recall whether in my opinion at that time, and it is some time ago, whether it was four weeks or six weeks or eight weeks, Mr. McInerney, but it is my general recollection [1757] it took too long.

Q. Were you involved in other duties in addition to this private label negotiation at that time? A. Oh, yes.

Q. Approximately how many products would you be responsible for buying as buyer for the Chicago Unit? A. There were approximately 8,000 items, on which I had varying degrees of responsibility.

Q. Now, did you ever suggest to Borden, or anyone from Borden, how much A&P hoped to save on private label milk? A. No sir, I did not.

Q. Did you ever mention that you were hoping for annual saving to A&P of approximately half a million dollars? A. No, sir.

Q. In your direct examination you were shown an exhibit which I believe is identified as Commission Exhibit 23, which had to do with differences in costs between New York and Chicago. Do you recall that, sir? A. Yes, sir.

Q. Now, on receipt of that exhibit—I have a copy here, if there is no objection I will show it to the witness. If there is, I will be happy to have the original out.

Mr. Mathias: Which exhibit?

Mr. McInerney: Commission Exhibit 23.

Mr. Mathias: Oh, no.

[1758] By Mr. McInerney:

Q. This is the first part of it, sir and I believe there were in addition certain attachments concerning which you

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testified. Do you recall whether when you received that, Mr. Schmidt, did you examine that in detail? A. I recall when it was presented to me at my desk, as I remember by Gordon Tarr and Joe Malone, they covered it in some detail with me at my desk. And it is my recollection that there was very little retained of what they said.

I recognized at that time my own inexperience in matters of cost of milk distribution, Chicago or New York or both, and as a consequence it made very little, little impression and was of very little value to me.

Q. Did you have any way of checking whether the figures given in that document as Borden's costs were indeed Borden's costs? A. No, I had no way of checking these figures.

Q. You were also shown a document which has been marked Commission Exhibit 41, and again in order to shorten the time I will show the witness a copy rather than digging out the original. Do you remember seeing that document, sir? A. Yes, sir.

Q. I believe you testified that the word insufficient at the lower left hand corner of that document, which I believe you described as your copy of a memorandum to Mr. Bartels, was written by you? **[1759]** A. Yes, sir.

Q. Now, without identifying the specific pages, what was it that accompanied that document that you have before you as a cover page which is Exhibit 41?

I would like the record to show that that is all the witness has before him. A. I would believe that the attachments to this letter were the Borden Company private label quotation and supporting papers, that they presented to me approximately July, of 1965.

Q. And do you recall what the projected savings were, that is, the savings estimated by Borden as between the Borden brand prices and the private label prices shown in that quotation, just the total number, if you recall? A. I recall that figure to be in the area of \$420,000.

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Q. Now, what does the word insufficient mean on that exhibit that you have before you? A. Well, basically, Mr. McInerney, this was a word that I selected for my own purposes as the word that would best describe, for me, the result of the conversation I had with Mr. Bartels concerning this document and its attachments. And to me it meant that there was not enough research study bids on which to make the final decision as to whether to go to private label milk, and if we did who the dairy would be that would get the business.

Q. Now, I believe you told us that at or about this time you [1760] did request quotations from other dairies, and that you mentioned Dean, Hawthorne Melody, Wanzer and Bowman. Now, from which of those dairies did you receive quotations for the Chicago area? A. We received a partial quotation for the South Bend area only, from Dean, and we received a full quotation for all stores in the Chicago Unit from Bowman.

Q. Do you know why Wanzer and Hawthorne Melody did not respond to your request for quotations? A. No, I do not, sir.

Q. And do you know why Dean gave an incomplete response to your request for quotation? A. No, I do not, sir.

Q. Now, you were shown yesterday, document marked Exhibit 50 which I will now give to you, and you described it as a quotation from Bowman. Will you tell us approximately when and how you received this quotation? A. I received this quotation from Mr. Frank Cannon, personally, in a visit in our office at my desk.

Q. Would you tell us what he said to you and what you said to him, as best you can recall it? A. The recollection that I would have is for the most part prompted by some notations that I have placed on the document. I recalled that I sat down at my desk, he presented this to me, and

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I read it in his presence and there were several questions
[1761] that I did raise that he clarified for me.

As I recall we first, or I first raised the question concerning this approximately \$1 million, and as the document indicates there is an asterisk with what I put down on the lower left hand corner as an explanation of that \$1 million, that it represented gross dollars at retail value.

I asked him on what basis he arrived at that \$1 million. He indicated that with his previous experience in supplying A&P on a part basis, he was acquainted with our volume, and that in his opinion the figure was approximately one million, projected the whole unit.

I do recall that he indicated that that figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if—well, those quotations, yes, would be applicable to all of our stores, and if not the quotations would go up as we reduced the number of stores.

Q. When you refer to the attachment, are you referring to CX 50-R, Mr. Schmidt? A. Yes, I am, Mr. McInerney.

Q. Would you please continue? A. In—

Mr. McInerney: I am sorry, would you read back the last, before I interrupted Mr. Schmidt, what he had been saying?

[1762] The Reporter: I do recall that he indicated that the figure was not a requirement to the quotation, and as I recall we did discuss one of the attached attachments which indicated that the quotations would be applicable to all of our stores if—well, if those quotations, yes, would be applicable to all of our stores, and if not the quotations would go up as we reduced the number of stores.

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By Mr. McInerney:

Q. And in saying that, Mr. Schmidt, you were referring to Exhibit 50-R. Does that indicate other prices in the event that you gave the Bowman Company A&P's milk and dairy product business on something less than 100 percent of A&P's stores? A. Does not to me, no sir.

Q. Would you look at the fourth and fifth columns of that exhibit, and tell us if there is a quotation in the event that Bowman were to supply 70 percent and 50 percent of A&P's stores in the Chicago Unit? A. Yes, sir, there is.

Q. I am sorry, I think I interrupted you in your description of what you and Mr. Cannon said to each other at the time of the submission of this quotation. A. And you would like to have me repeat the essence of it?

Q. No, I would simply like to have you tell me what he said to you and what you said to him. A. On this matter of the quotation in the event he got all [1763] of the stores or part of the stores?

Q. If you recall anything else about that or if not on any other subject. A. Oh. I recall nothing further on this reference of approximately \$1 million or Exhibit 50-R.

Judge Hinkes: Before you go on, Mr. Schmidt, on Exhibit 50-R the first column is entitled, "Standard list price to chain store."

What, if you know, does that represent?

The Witness: Your Honor, I have no recollection of analyzing the heading on that particular column at the time that Mr. Cannon was at my desk.

Judge Hinkes: Let me ask you this. The next three columns are net prices, according to the chart.

The Witness: Yes, sir.

Judge Hinkes: These are the prices quoted to you by Bowman, as your cost of the various items, is that correct?

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The Witness: Yes, sir.

Judge Hinkes: Now, comparing those figures with the much higher figure in the first column of list prices, would that indicate your cost of Bowman's milk, rather than private label, or would it represent your selling price? If you know.

Mr. McInerney: Your Honor, I think I can clarify that, if you will.

Judge Hinkes: Very well.

【1764】 The Witness: Sorry.

By Mr. McInerney:

Q. Would you look at Exhibit 250-A, the first page of this exhibit, sir. I am sorry, Commission Exhibit 50-A.
A. All right.

Q. And at the bottom of that page, or toward the bottom, rather, there is a listing of four items, the second of which contains a pencilled notation, and can you tell us whose handwriting that is? A. That slash and the word "or" is in my handwriting.

Q. And was that as a result of your conversation with Mr. Cannon? A. Yes, it was.

Q. Will you tell us what that means? A. Well, it was my interpretation as I read that subparagraph 2 in his presence, that both the Bowman label and the A&P label, might be necessary to secure the attached quotations. However, when I raised that point he indicated no, it could be the Bowman label or the A&P label, or both.

Q. And would the prices quoted to you, for example, on Commission Exhibit 50-I, if you would look at that page. A. Yes, sir.

Q. Would they be the same whether it was Bowman label or private label? A. Yes sir, that was my understanding.

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【1765】 Q. In other words, this was a quotation of a net price to you, whether you took it as Bowman label milk or A&P label milk? A. Yes, sir.

Mr. McInerney: I don't know if that clarifies it, Your Honor.

Judge Hinkes: Yes.

By Mr. McInerney:

Q. Now, you were telling us, Mr. Schmidt, about the talk you had with Mr. Cannon of Bowman Dairy. Incidentally, did we establish who Mr. Cannon is? Can you tell us?

I am not clear whether the record indicates who Mr. Cannon is, or was at that time. A. I did not know his exact title at that time. However, I knew he was responsible for sales of the Bowman Dairy Company. I see on the document that his title was General Manager, Wholesale.

Q. And had he previously to this time in 1965 called on A&P and sold milk to A&P, the Bowman milk? A. Yes, he had, and up until the mid 50's, at which time the Bowman Dairy served approximately half of the Chicago Unit A&P stores with dairy products.

Q. And who sold approximately the other half? A. The Borden Company.

Q. And somewhere in or around that time the Bowman Company ceased to supply A&P, and the Borden Company took over most 【1766】 of the supply of A&P's dairy products, is that correct? A. Yes, sir.

Q. Would you please continue with what you recall about what you said to Mr. Cannon and what he said to you on the occasion of his submission of this quotation? A. I do recall that we went over this document page by page, but I don't have anything noted until we get to Exhibit, I believe that is 50-I.

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Q. Is that your handwriting at the bottom of 50-I? A. Yes, sir, it is.

Q. And what was the occasion for your writing that? A. I saw that word on top of column two, the word "mark up", and asked him what that included. And he indicated to me that it included overhead and profit.

Q. How much profit? A. He volunteered, approximately six percent.

Q. Do you recall anything else that was said on this occasion? A. I have no recollection, Mr. McInerney, of anything else that we discussed on that occasion, other than what I have commented on.

* * * * *

【1772】 Judge Hinkes: Well, suppose you try again and see if you can have it a little clearer to the witness without any leading.

By Mr. McInerney:

Q. Can you tell us, Mr. Schmidt, when, or under what circumstances, there was first any discussion with anyone from Borden with respect to the point of revising the quotation about which you have previously testified, and to which you referred, I believe, when you were looking at Exhibit 41, which was that memorandum from you to Mr. Bartels, on which you had written "insufficient"? A. It is my recollection that certainly within several days after my conversation with Mr. Bartels that resulted in my writing the word insufficient on my file copy of that document, that I contacted the Borden Company, Gordon Tarr, specifically, and indicated to him that we were going to ask other dairies to give us a quotation on our private label milk.

And that since we were going to go to outside dairies for quotations on private label milk, and because the quotation we had received from them did have some age to it,

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we would give them the opportunity of re-evaluating it, or of indicating to us that after their evaluation, it would stand as submitted.

That is the best of my recollection, Mr. McInerney.

Judge Hinkes: M.: Schmidt, your previous testimony was to the effect that you did tell Mr. Tarr that you had other [1773] competitive bids. But you didn't tell him that you had the Bowman bid, is that correct?

Mr. McInerney: May we just get the time sequence, Your Honor?

Judge Hinkes: Yes, this was after you had received the bid from the Bowman Company. And if I understand your testimony, and correct me if I am wrong, you then told Mr. Tarr that you had other competitive bids but didn't say that you had the Bowman bid, specifically?

The Witness: That is correct, and as Mr. McInerney has hinted, there are two periods of time involved. My answer to his last question related to the conversation I had with Gordon Tarr after Mr. Bartels and I made the decision to get to other bids.

My conversation with Mr. Tarr in which I indicated to him that we had competitive bids occurred after we had received the Bowman bid, and there is a time span of approximately two to three months.

Judge Hinkes: Now, at that second occasion, which was the one I was referring to in my question, you also told Mr. Tarr something about your waiting for their revised bid, is that correct?

The Witness: Their revised bid, or an indication that the first bid should be the one that we would consider as the only bid.

[1774] Judge Hinkes: Well, isn't that the same thing that you told Mr. Tarr at the first occasion?

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Mr. McInerney: I think that is the confusion, Your Honor. Well, the witness can explain it.

Judge Hinkes: A moment ago I thought you told me that on the first occasion you told Mr. Tarr that they could revise their bid or stand by it?

The Witness: That is right.

Judge Hinkes: Now, on the second occasion you told them the same thing.

The Witness: Yes sir, because we still had not received an answer from them.

Judge Hinkes: Very well.

Mr. McInerney: The only difference if I may, Your Honor—

Mr. Mathias: Your Honor, I would object to Mr. McInerney characterizing the witness' testimony.

Mr. McInerney: All right.

Mr. Mathias: The witness has testified, and Mr. McInerney's testimony is not needed on this point.

Judge Hinkes: I think I understand the witness' answer, Mr. McInerney.

By Mr. McInerney:

Q. Had there been any response from Borden, between the time that you told Mr. Tarr that A&P was going to solicit other [1775] quotations, and the conversation about which His Honor was just questioning you? In other words, had there been any word from them in the meantime as to whether they were going to let their previous quotation stand or revise it?

Mr. Mathias: Your Honor, I again object to leading the witness.

Mr. McInerney: I submit that was not a leading question, Your Honor.

Judge Hinkes: I think the witness has already

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answered that in response to my question, when he said that he hadn't heard anything.

Mr. McInerney: All right, I simply wanted to clarify the matter, and if it is clarified I will drop the subject.

By Mr. McInerney:

Q. Now, as best you can recall, when and how did you first learn that Borden was going to revise the quotation it had given you sometime in the summer of 1965?

Mr. Mathias: Your Honor, I would again object to leading the witness. I don't believe there is any necessity at this point. There has been no testimony by the witness at this stage that he had learned of this intention.

I believe that Mr. McInerney's question is leading, and unnecessarily so at this point.

Mr. McInerney: Your Honor, I submit that there [1776] is no dispute here about whether or not there was a revision, and I was merely trying to expedite matters. Again I don't think it was a leading question.

I have been very restrained in making that objection to Mr. Mathias's questions, I submit—

Judge Hinkes: Well, in any event, I will allow the witness to answer. I think that you certainly are aware, Mr. McInerney, that to the extent the question may be leading, you diminish the probative value of the answer and it is to your own advantage not to employ those questions whether or not objection is made.

Mr. McInerney: Yes, Your Honor, but I did not believe it is leading. If Your Honor thinks it is leading, I will try to rephrase it. I don't think there

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is any dispute about the fact there was such a revision, and I am merely trying to get when he learned about it.

Judge Hinkes: The witness will answer.

The Witness: I don't recall the specific date, but I do recall receiving a phone call from Mr. Tarr, indicating that I would receive a revised quotation. I asked him, as I recall, approximately when I would receive it. And he indicated that it would take some days to type it and put it in good order and present it to me.

And I do recall that he made the comment that the savings would be substantially increased. Now, again bear **【1777】** in mind that I cannot quote him directly. The general recollection I have is that he made reference to the fact that the savings would be greater than the quotation previously submitted would afford.

Of course, then the quotation was delivered. Again here my recollection is hazy, but I believe perhaps within the week.

By Mr. McInerney:

Q. Was it delivered to you, sir? A. I don't recall that specifically either, Mr. McInerney. It was delivered, certainly. The copy eventually came to my attention. A likelihood that it was delivered to my assistant at that time, or to someone else in the building, but as I say, the best of my recollection needless to say, and the evidence is there, it was given to me.

Q. Now, when your—I am sorry, go ahead. A. I also recall of course that that quotation that was delivered to me, did include a quotation on glass. Here again my recollection is hazy.

I believe that when I heard that there was glass quoted that I called Gordon Tarr again and indicated to him that

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that particular item should be removed, and this then prompted the recompilation of the quotations without it.

And then of course we scheduled the appointment in Libertyville, that resulted in presentation of the final
【1778】 quotation.

Q. Now, just so that the record will be clear, when you spoke of a quotation that included the gallon glass—

May I have Exhibits 56 and 62?

Is this document which is marked Commission Exhibit 56-A and subsequent letters, the quotation to which you refer? A. Yes, sir.

Q. And why did you tell the Borden Company that the gallon glass quotation was not what you wanted? A. Basically we recognized, at least I did, I believe I recall that I was at that time reflecting the opinions of the Chicago Unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level.

Needless to say, it requires more space in the cases, you have the problem of collecting the deposit, making the refund, storing the bottles at the checkout counter, moving them to the back room, assembling them for pick up by the driver-salesman on the next visit to the store.

Basically for that reason we decided to exclude it.

Q. Does gallon glass involve any other additional expense to the retail store, in private label?

Mr. Mathias: Your Honor, I object, unless this witness is shown to be qualified to testify concerning the retail qualification.

【1779】 Mr. McInerney: Well, I think there is an exhibit about this, and you have already questioned him about it, Mr. Mathias.

Mr. Mathias: Your Honor, I recall no questions put by me to Mr. Schmidt concerning costs.

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Mr. McInerney: May we have Commission Exhibit 66, please?

Oh, I have it. Thank you.

Mr. Mathias: Your Honor, before he asks a question, I would like to have a chance to look at this exhibit myself.

All right, fine.

By Mr. McInerney:

Q. Would you look at Commission Exhibit 66 and tell us if that refreshes your recollection as to any additional items that were considered when you decided not to take gallon glass in private label? A. Yes, it does, Mr. McInerney.

Q. Would you tell us what the additional items were? A. At that particular time glass bottles in the Chicago market area were identifiable with an imprint or a print on the glass bottle itself. Now, this imprint identified the dairy that packaged it and delivered it.

In private label, it would be required of us to have an imprinted glass bottle, that imprint bearing our logo.

Q. And who would bear the expense of the imprint of glass [1780] bottles? A. It is my recollection that this was discussed with the Borden Company, and we recognized that there would be a cost factor that we in A&P might have to share in; if not in total, in part.

Q. Now, were there any other reasons why you were not interested in gallon glass in private label at this time, as best you can recall? A. It is the best of my recollection that returnable glass, whether in milk or beverages, was being replaced in the case of dairy with paper, in the case of beverage of course, with NR bottles.

Q. All I want at this point, Mr. Schmidt, is what you discussed with the Borden Company or with Mr. Bartels as to why gallon glass was not acceptable as a private label item? A. I have no other recollection, Mr. McInerney.

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Q. Now, you also mentioned a second quotation or a final quotation from the Borden Company that you received in Libertyville. And again, for purposes of clarity in the record, I would like to show you Commission Exhibit 62-A, and subsequent numbers, and ask you to look at that and tell us if that is the final quotation to which you refer?
A. Yes, sir, this is the final quotation.

Mr. McInerney: Your Honor, the witness has been on for well over an hour. If this is an appropriate time—

【1781】 Judge Hinkes: Very well, we will take a short recess now.

(A brief recess was taken.)

【1782】 Judge Hinkes: Mr. McInerney.

By Mr. McInerney:

Q. Just before the recess, Mr. Schmidt, I think you had identified Commission Exhibit 62 as the final quotation from Borden which you received at a meeting in Libertyville. First of all, can you tell us why you received it in Libertyville, rather than at your office in Chicago? A. Yes, sir. I was on vacation at that particular time. It was a time my wife was expecting our fifth child, and I recognized the urgency of finalizing the decision, and I indicated to Mr. Bartels that while I was on vacation, I would meet with the Borden Company to secure this final quotation and then submit it to him after I received it.

I recall setting this appointment up with the Borden Company for the VFW hall in Libertyville; I note by the date of the document perhaps several days after the 21st of September.

Q. Who was present at that meeting? A. Mr. Ralph Minkler and Gordon Tarr, of the Borden Company, and myself.

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Q. Would you tell us, please, what was said and done by the participants in that meeting? A. To the best of my recollection, we met, they presented this document and they went over it page by page; they explained some of it, I observing all of it. We discussed the matter of approximately, the approximate savings involved.

【1783】 Q. Is there anything— A. I recall that I asked them for a letter indicating that these prices would be offered to others on proportionately equal terms. There was reference by them to the necessity of my saving the competitive bids. I indicated to them that we would.

As I recall, I knew that I was going to submit copies of the quotations, the so-called bids from Bowman, and this Borden bid, to Mr. Bartels, so that, of course, he would have it in his files, and I in mine. That is the sum and substance of my recollection, Mr. McInerney.

Q. You mentioned the subject—

Mr. Mathias: Your Honor, I would object to Mr. McInerney repeating the witness' testimony in phrasing his questions. I believe that in doing so, we face the risk of getting an inaccurate depiction of Mr. Schmidt's testimony and also that there is the possibility of coaching the witness.

Mr. McInerney: I don't think that there is anything improper in keeping the continuity. I think if Mr. Mathias had heard my whole question, he would have no objection. By my saying he mentioned a certain subject, and asking him if he can remember anything further with respect to that subject, this I am trying to elicit a memory of some eight years ago.

Judge Hinkes: State your question.

【1784】 *By Mr. McInerney:*

Q. You mentioned that there was some discussion of the subject of the savings that would be involved. Can you

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recall what the substance of that discussion was, on the subject of the savings that would be involved? A. It is my recollection that I wanted to be sure that with the removal of the quotation on glass in the previous quotation, that the savings would nevertheless be reflected in the new quotation.

Q. And was there a dollar amount mentioned as to what the savings would be on the assumption that you had the same volume as in the previous year and that you switched entirely to the private label milk and that the Borden brand prices remained the same? A. Mr. McInerney, I would like you to repeat that question, particularly the opening of it, if you can.

Q. I am inquiring as to whether there was any discussion or figure mentioned as to the total amount of the saving that A & P might expect to get by accepting this private label offer, in comparison to the Borden brand prices. If I am not making myself clear, I will be happy to rephrase that. A. I would believe, Mr. McInerney, that reference was made to those savings on the strength of the inclusion of it in the document as they presented it to me.

Q. The document presented to you, if you will note, on [1785] Commission Exhibit 62-B, mentions a figure of some \$880,000. Was there a discussion of whether you would, in fact, save \$880,000, if you recall? A. I have no recollection that that was discussed at this meeting, but I would have to believe that there was because of the handwritten letter that I directed to Mr. Bartels in which I make reference to a reduction in that savings because the cost of raw milk had changed from the date that the quotation was prepared for us.

Q. May the record show that I am showing the witness Exhibit 66-B, and I ask him whether the second paragraph of that page is the reference to which you have just referred? A. Yes, sir, it is. Yes, sir, it is.

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Q. And does that refresh your recollection as to whether there was some discussion to the effect that this \$880,000 figure was not quite accurate because of an increase in the raw milk cost that would be passed along onto A & P in the private label prices, but that had been absorbed by Borden in its Borden label prices? A. I would have to conclude that this subject as shown on my letter was mentioned at the meeting, yes, sir.

Mr. Mathias: Your Honor, I would move that the answer be stricken. If he is only testifying as to what his memorandum stated at the time, I do not believe that there is any probative value in his statement.

【1786】 By Mr. McInerney:

Q. Let me ask what your best recollection is Mr. Schmidt, now that you have looked at the memorandum? A. Mr. McInerney if I may answer you question this way: That this particular subject, and my report of this particular subject is the result of the meeting in Libertyville—

Q. Is Commission Exhibit 66, in effect, a report from you to Mr. Bartels of the meeting in Libertyville? A. Yes, sir.

Q. All right sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?

Mr. Mathias: Your Honor, I object to that question. The memorandum speaks for itself.

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. Will you tell us, Mr. Schmidt, whether you communicated in some way to Mr. Bartels that you had requested a

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letter of availability, or however you want to describe it, from the Borden Company?

Mr. Mathias: Your Honor, I object to that as a leading question.

Judge Hinkes: I will allow the witness to answer.

The Witness: Yes, I did make such a request in my [1787] communication to him dated September 28, Exhibit 66-B.

Mr. Mathias: Your Honor, I would move that the answer be stricken since the witness is only reading from CX-66-B, which is in evidence, and—

Judge Hinkes: The answer stands, in any event. It is responsive to the question as to whether he communicated with his superiors on that subject, and to that extent, it is perfectly proper. It adds nothing, however, to the state of the record.

Mr. McInerney: I think that in answer, would you read the witness' answer back, Mr. Reporter, I think there may have been a misstatement.

(The record was read by the reporter as follows:

"Question: All right, sir. You also mentioned that you requested from Borden a letter concerning proportionately equal prices. Did you report that to Mr. Bartels in your memorandum which has been marked Exhibit 66?"

"Answer: Yes, I did make such a request in my communication to him dated September 28, Exhibit 66-B.")

By Mr. McInerney:

Q. Had you completed your answer, now that you have heard it read, Mr. Schmidt? A. That is not the answer I intended.

Q. Please, just give us your best recollection of whether or not you communicated to Mr. Bartels that you had made

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a request [1788] of the Borden Company for a letter with respect to this offer. A. I communicated my request to the Borden Company in my note in my letter to him dated September 28.

Q. Do you recall having any conversation with Mr. Bartels with respect to this request of Borden for such a letter? A. I recall no conversation with Mr. Bartels, prior to the actual receipt of the letter.

Q. At your meeting in Libertyville, do you recall whether anything else was said about this letter from the Borden Company that you requested of Mr. Minkler and Mr. Tarr? A. It is my recollection that they indicated that such a letter would be forthcoming. But here again, I can't be more specific than that because it was eight years ago, but I believe that if there had been any, anything other than that positive indication, I am certain I would have recalled it.

Q. You also mentioned that they asked you to save the competitive offer or offers. Was there anything further said on that subject; what did you say to them with respect to that, if you can recall? A. It is my recollection that I informed them that we would, since that was part of our usual procedure.

Q. And is that, in fact, part of A & P's usual procedure? A. We keep—

Q. As far as you know? A. —We keep copies of all quotations received, Mr. [1789] McInerney.

Q. Do you recall anything else about this meeting at Libertyville at which you received this final quotation from Borden? A. No, sir, I can't recall anything else, Mr. McInerney.

Q. Apart from the reference of saving the competitive offer or offers, do you recall whether anything was said on the subject of Borden Company's competition, or meeting competition? A. I don't specifically recall if at that meeting there was reference to the phrase you used, "meeting competition," or competitive offers. But in the many con-

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versations that I had with Borden, they made reference to any number of subjects. I believe I recall correctly that reference was made to meeting competition or competitive bids or competitive situations, along with what I chose to consider at best salesmen's talk.

The conversations that the Borden Company and I had on this matter of private label milk, in my opinion, were always too protracted. I loaned them an attentive ear but much of it, as I said, I considered in the area of salesmen talk.

Q. Did Mr. Minkler or Mr. Tarr attempt to explain in any way the revision that they had made? Let me ask, first, did they indicate that they were embarrassed in any way by making this revision?

Mr. Mathias: Your Honor, I believe that that is a leading question. It has been asked, but again, Mr. McInerney is putting words in the witness' mouth.

【1790】 Mr. McInerney: No, I am trying to refresh his recollection, if there is a recollection to be refreshed.

Let me strike the question and just ask, in your previous answer about salesmen's talk, why did you consider it salesmen's talk?

Mr. White: I object to that, Your Honor. When he made that, he was talking about something which was unidentified as to time. He said that these things went on over a long period of time. I think the answer as to why he considered something said to him that isn't even identified as to date or its relationship to this has anything to prove or disprove in this case.

Judge Hinkes: I don't know that his reference to salesmen's talk was specifically directed to the meeting that he had in September of 1965.

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Mr. McInerney: I don't know either, Your Honor.
Judge Hinkes: I think that I would have to sustain
the objection.

By Mr. McInerney:

Q. Can you recall specifically, Mr. Schmidt, can you pinpoint when this reference to competition may have been made? A. I have no recollection that would pinpoint it.

Q. Whenever it was, can you tell us why you considered it salesmen's talk?

Mr. White: I object to the question.

【1791】 Judge Hinkes: I am going to sustain the objection. I think we are reaching, at this point.

By Mr. McInerney:

Q. At this meeting in Libertyville, did Mr. Minkler or Mr. Tarr inquire what the price level of the competitive offer or offers that you had might have been? A. No, sir.

Q. Was there any discussion with respect to meeting or beating competition, as best you can recall?

Mr. White: I object. He has been asked and answered the question already.

Judge Hinkes: Let the witness answer. I am not sure that that specific question has been answered.

The Witness: Would you restate that question, please Mr. McInerney?

Mr. McInerney: Would you read it back, please, Mr. Reporter?

(The record was read by the Reporter as follows:

"Question: Was there any discussion with respect to meeting or beating competition, as best you can recall?"

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By Mr. McInerney:

Q. We are talking now about the Libertyville meeting, Mr. Schmidt. A. Yes, sir, I have it pinpointed to that date.

It is my opinion—

【1792】 Q. I don't think— A. I am sorry, it is my recollection that they used the phrase "meeting competition" or "beating competition" as the reason for asking me to make sure that we would save and keep in our files the competitive bids.

Q. Do you actually recall that, Mr. Schmidt, specifically?

Mr. Mathias: Your Honor, I object to that question.

Mr. White: He has just testified to it. Now, he is—

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. What else was said on the subject of competitive bids, if you recall, Mr. Schmidt? A. Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, I considered it salesmen's talk. As a consequence, my memory is not sufficient to indicate when and who said it.

Mr. McInerney: I think it would be only fair if I am permitted to point out to the witness that—

Mr. Mathias: Your Honor, before he makes the statement, I would like the witness excused from the room and I would like to hear what the statement is.

Mr. McInerney: All right, would you mind, Mr. Schmidt?

【1793】 The Witness: Not at all.

(The witness left the room.)

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Mr. McInerney: If you would prefer, we can do it off the record.

Mr. Mathias: I would prefer it on the record.

Mr. McInerney: All right.

Judge Hinkes: All right, let's have it on the record.

Mr. McInerney: I think it is clear, Your Honor, that the witness is confused at this point. He has testified that he couldn't pinpoint any specific discussion with respect to this. And I was simply trying to wrap this up and get rid of the subject, and now he thinks he recalls something, and I am trying to find out what could possibly be the difference between what he is saying now and his reference immediately preceding that, he couldn't pinpoint any discussion with reference to this.

I think it is only fair to point out to the witness that his previous testimony was that he could not recall anything, and now he is attempting to recall something and I would like to find out exactly what it is that he recalls. And I think at this point since the witness appears to be confused, it is fair for me to ask leading questions of the witness.

Mr. Mathias: Your Honor, I believe that the witness had answered in response to repeated inquiries from Mr. [1794] McInerney concerning the September, late September meeting, that he could recall that the term "meeting competition" was used in connection with the request to save the competing bids.

I don't believe there is any ambiguity or unclarity in the record on that point. What Mr. McInerney is trying to do, he has also stated that in a number of instances, that it seems to him that he has a hazy recollection that the term "meeting competition" was

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mentioned in a number of meetings with the Borden Company and to this effect.

What Mr. McInerney is trying to do is to attack one statement elicited by him of what I consider to be his own witness, and I believe that it is manifestly improper to allow him to continue and harp and hit at this point. The witness' testimony is clear; there is no ambiguity in the witness' testimony.

Mr. McInerney: Your Honor, I think it is far from clear. I think that we went through this and he said many times that he could not recall any specific occasion.

Judge Hinkes: That is true, but his most recent utterance was that he did remember this mention of meeting competition or beating competition.

And he did say that this was in connection with their request to him that he save the competitive bids.

Mr. McInerney: If your Honor—I am sorry.

Judge Hinkes: You may make your argument on the state of his recollection and you may also explore further what [1795] else he may remember but it is not at all unusual for a witness to have a hazy memory and then the more he thinks about it, to recollect a detail here or a detail there.

That is not at all inconsistent, and I don't think that we have to belabor that issue. If you wish to explore the issue further, you may, with the witness. But I don't think you can ask him to explain why he remembers now that he didn't remember earlier. I don't think that is going to be productive of any valuable answer.

Mr. McInerney: I don't know whether it will or not, Your Honor, I have no way of knowing, and all I am trying to do is get at what the facts are.

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Judge Hinkes: He has told us what the facts are. These are now the facts as he states them.

Mr. McInerney: If you will recall, Your Honor, he prefaced that with the statement that "in my opinion," something or other. I don't remember what it was. And I am trying to show the state of his recollection is unclear. I am trying to establish that as best I can do.

I don't think that Mr. Mathias' statement that the record is clear—I agree with that to the extent that it is clear that he could not remember any reference to meeting competition.

Judge Hinkes: I think that all you can be permitted [1796] at this point is to ask him once again this is what he recollects, what he has just testified to. If you are not sure that that is the nature of his testimony, you may ask him that. But I think the record will demonstrate that he did say when he was stopped from giving an opinion that his best recollection was thus and so.

If you wish to, once again, ask him whether that is his best recollection, I think that is entirely permissible, but I don't think we should go into that any further.

Mr. McInerney: Your Honor, I have several questions I wish to ask him on this line.

Judge Hinkes: We can only deal with them one at a time. I mean, as far as your pending question is concerned, I don't think that is appropriate.

Mr. McInerney: Very well, Your Honor.

Judge Hinkes: We will call the witness back in.

(The witness re-enters the room and resumes the stand.)

Judge Hinkes: You may continue, Mr. McInerney.

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By Mr. McInerney:

Q. Mr. Schmidt, did you ever report to Mr. Bartels or anyone at A&P that any reference had been made in your conversation with Mr. Minkler and Mr. Tarr to meeting competition? A. No, sir, I did not.

Q. In your written report, which is Commission Exhibit 66, **【1797】** is there any reference to it in that report?

Mr. White: I object.

Mr. Mathias: I object to it, Your Honor. The record speaks for itself.

Judge Hinkes: Sustained.

By Mr. McInerney:

Q. Is there any document or other thing that might refresh your recollection with respect to whether or not the subject of meeting competition was mentioned at this Libertyville meeting? A. No.

Mr. Mathias: I object to the form of the question, Your Honor. If there is any document, let Counsel come forward with it.

Judge Hinkes: I don't know that the need for refreshing his recollection has been established, Mr. McInerney. You might first ask him whether he does recollect, or whether he has some difficulty in recollecting that subject matter, and then explore it.

By Mr. McInerney:

Q. Do you have difficulty, Mr. Schmidt, in reconstructing what was said at this Libertyville meeting, with respect to meeting competition? A. Absolutely.

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【1805】 * * *

Mr. McInerney: I don't think there is any reason at this stage to curtail my examination in that manner.

Judge Hinkes: In any event, I don't know what the next question will be. But if there is any objection, I will make my ruling at an appropriate time. In any event, I don't see there is any reason for excluding the witness any longer; but it is 12 o'clock.

Mr. Mathias: Your Honor, could we go just a few minutes to see if this line of questioning is exhausted; either that, or I would like a ruling Mr. Schmidt may not consult with A & P Counsel over the lunch time.

Judge Hinkes: Very well. Let's call Mr. Schmidt back in.

(The witness re-entered the room, resumed the stand.)

Judge Hinkes: Mr. McInerney.

By Mr. McInerney:

Q. Mr. Schmidt, I believe you have testified that you did not report to Mr. Bartels or anyone at A & P that the subject of meeting or beating competition had been discussed between you and anyone at the Borden Company.

My question is, can you tell us why you would not have
【1806】 reported that?

Mr. Mathias: I object to the form of the question, "why you would not have reported."

Judge Hinkes: "Why you did not."

Mr. McInerney: All right, sir.

The Witness: I did not attach any importance to their statement to me. The reason I didn't consider

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it important is because I considered it as their reason for asking me to keep the bids and that basically the letter that I had requested indicating that the offer would be made on proportionately equal terms, was the only requirement that we would need to accept the quotations as submitted to us.

By Mr. McInerney:

Q. Can you recall any other reason why you did not report any such subject to anyone at A & P, if you can recall? A. It is only through this kind of interrogation, Mr. McInerney, that I suddenly become aware of the apparent importance of this statement. I certainly under no circumstances knew the significance of it at the Libertyville meeting, or in subsequent months and years.

Mr. White: Your Honor, I move to strike the answer as not responsive to the question.

Mr. McInerney: No, I think it is.

Judge Hinkes: Whether the answer is responsive or not is something for Mr. McInerney.

【1807】 Mr. White: That is the basis for my late objection, Your Honor, and on the ground that the testimony itself is incompetent and does not tend to prove or disprove any issues.

Mr. McInerney: I think that goes to the—

Judge Hinkes: In any event, the witness' answer will stand.

As I understand what you are saying, Mr. Schmidt, at the time you didn't think it was important; now you think that it appears to be important?

The Witness: Yes, sir.

Mr. McInerney: I think this is a good hour for our recess.

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Judge Hinkes: We can recess at this time.

Mr. Mathias: Your Honor, I think I would like to ask Mr. McInerney if he intends to ask any further questions along this line after the luncheon period.

Mr. McInerney: I don't have any intention, Your Honor. At present; if I do, I will advise you before in the absence of the witness.

Mr. Mathias: Your Honor, my point is if this point is to be perused at any great detail after the luncheon period, then I believe that the witness and Mr. McInerney should not go to lunch together and confer together over the luncheon period.

Mr. McInerney: Your Honor, I think I can represent to you that I have finished, to the best of my knowledge, the **【1808】** subject of the Libertyville meeting.

Judge Hinkes: Let me put it this way to you, Mr. Schmidt. I will ask you not to discuss your testimony with anyone, particularly with respect to this matter of meeting or beating competition in the September 1965, meeting at Libertyville.

And I want you not to discuss that with anyone during this lunch period that we are going to take now.

And I will ask you, Mr. McInerney, to observe the same restriction.

Mr. McInerney: Yes, Your Honor.

The Witness: Yes, Your Honor, I will.

Mr. McInerney: That does not mean, however, Your Honor, I cannot show the witness documents with respect to other subjects and interpret them in order to expedite the testimony.

Judge Hinkes: As long as it does not have anything to do with this subject of meeting or beating competition, and whether it was discussed or why

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it was discussed, and why it was not discussed during the September, 1965, meeting at Libertyville.

Mr. McInerney: I understand, Your Honor.

Judge Hinkes: Very well.

The Witness: I understand too.

Judge Hinkes: We will be in recess until 1:30 p.m.

(Whereupon, at 12:10 p.m. a recess was taken until 1:30 p.m. the same day.)

【1809】 AFTERNOON SESSION

1:30 p.m.

Judge Hinkes: The hearing will be in order. Mr. McInerney.

ELMER R. SCHMIDT resumed the stand and testified further as follows:

Cross Examination by Mr. McInerney (Resumed):

Q. During the Noon recess, Mr. Schmidt, did we discuss the Woodstock meeting or any other aspect of your testimony? A. No, we did not.

Q. I am sorry I misspoke myself, the Libertyville meeting, did we discuss that? A. No, we did not.

Q. Did we discuss any aspect of your testimony? A. None whatsoever, Mr. McInerney.

Q. Did I show you any documents? A. No, you did not.

Q. Sir, just before the recess, you had requested a letter from the Borden representatives, at the time that they submitted what we have been calling their final quotation, which is Commission Exhibit 62. Did you receive such a letter? A. Yes, sir, I did.

Q. Showing you what has been marked Respondent A & P's 【1810】 Exhibit 2, would you tell us what that is?

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A. This was the letter that was given or transmitted to me in compliance, with my request.

Q. And on receipt of that letter, what did you understand it to constitute?

Mr. Mathias: Your Honor, I object to any characterization by this witness as to what this letter constitutes. The letter speaks for itself. It is in evidence.

Judge Hinkes: I don't think we would want to consider this witness' understanding except to the extent that it influenced any later action on his part, if that is the case.

By Mr. McInerney:

Q. Did you believe, sir, that the letter that you have in your hand was compliance with the request that you had made at the meeting in Libertyville? A. Yes, sir.

Mr. Mathias: Your Honor, I object to the question, that it is a leading question, and unnecessarily so. It calls for a specific condition inclusion by the witness, and I believe that on this area of the negotiations that Mr. McInerney should restrict himself to a proper examination of the witness.

Mr. McInerney: It was objected when I asked him what it did constitute, and now it is objected to when I make the question more specific. I don't quite understand.

Judge Hinkes: I will overrule the objection. Did [1811] you get the answer of the witness?

(The record was read by the Reporter as follows:
"Answer: Yes, sir.")

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By Mr. McInerney:

Q. And what did you do with that letter, Mr. Schmidt?
A. It was transmitted to Mr. Bartels' offices.

Q. Did Mr. Tarr or anyone from Borden, during the course of your negotiations with them on private label milk, ever indicate to you that the prices that A&P was being quoted would not be made available to others? A. No, they did not.

Q. Did they indicate to you that the Borden quotation was not cost-justified? A. I do not recall that they said that.

Q. When you received that quotation and the letter that you have already testified to, that you passed it along to Mr. Bartels, A & P Exhibit 2, how did you send them to Mr. Bartels, do you recall? A. I do not specifically recall how that was transmitted to Mr. Bartels.

Q. I would like to show you an exhibit in evidence as Commission Exhibit 263-A, and ask you to look at it and see if that helps to refresh your recollection as to what it was you transmitted to Mr. Bartels? A. I notice that in this particular document that Mr. Bartels **[1812]** forwarded to Mr. Smith, the letter of Mr. Tarr dated October 1 in reference to my request, is attached.

Q. Do you have a letter that will identify that?

Judge Hinkes: 263—

Mr. McInerney: Is it H?

Judge Hinkes: It looks like it could be H. It is rather blurred, that is all I can say.

Mr. McInerney: Thank you, Your Honor.

Mr. Mathias: It is "H", sir.

Judge Hinkes: Very well.

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By Mr. McInerney:

Q. Apart from the cover page, which is indicated as Commission Exhibit 263-A, would you tell us whether the rest of that Exhibit, all of the subsequent pages, were what you transmitted to Mr. Bartels, as best you recall? A. Yes, it is my recollection that I transmitted everything except that first page to Mr. Bartels.

Q. When you did that, do you recall what your state of mind was with respect to whether the Borden quotation was cost justified? In other words, Mr. Schmidt, if I may define what I mean by that, just for purposes of clarity, that the reduced prices to A & P reflected savings in cost to Borden, in the quantities and methods of delivery by which they would be supplying private label milk to A & P from their Woodstock plant?

Mr. Mathias: Your Honor, I am going to object to that [1813] question. There has been no foundation laid for that question.

Mr. McInerney: The purpose of the question, I think it goes to the good faith of the witness and the Company in reviewing this quotation, Your Honor. I don't think any foundation needs to be laid for it.

Judge Hinkes: It seems to me that the question should be answered. I am not at all sure that this witness' understanding would be particularly pertinent, but nevertheless, I will allow it.

The Witness: It is my recollection that I believed that this quotation was given to us on cost justification, that through the reduction of services of one kind and another to our stores, with the operation of that new Woodstock plant, which I understood to be one of the most modern, if not the most modern in the world at that time, that the opportunities of saving monies were there for the Borden Company.

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By Mr. McInerney:

Q. Was the efficiency of the Woodstock plant a matter that you discussed with representatives of the Borden Company prior to the submission of this quotation? A. It was discussed in general terms. They were extremely proud of it, needless to say. I personally recall riding past their old North Tripp Avenue plant twice a day on the commuting train. I observed the condition of that plant and could visualize and appreciate the improvements in processing, handling [1814] milk through a modern plant such as Woodstock.

Q. Do you recall whether the subject of palletization of milk deliveries was discussed by representatives of the Borden Company prior to the submission of this quotation? A. I was aware that palletization of milk was in use at Woodstock. I do not specifically recall, however, that it became part of this request or presentation of their quotations, Mr. McInerney.

Q. Sir, when you transmitted these quotations to Mr. Bartels, what was your recommendation or your opinion with respect to the relative merits of the Bowman bid vis-à-vis the Bowman bid?

Mr. Mathias: Your Honor, I object to the question. I think the documents speak for themselves and any transmittal letters or memos.

Judge Hinkes: The documents may speak for themselves, but that doesn't necessarily reflect the attitude of the Company involved.

I will allow the answer.

The Witness: Mr. McInerney, it is my recollection that I considered the Borden bid to be a better bid than the Bowman bid.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. Sir, at that time, did you examine these quotations in great detail, and analyze them in great detail? A. I did not examine them in the detail at that time that I [1815] have since that time, and the examination since that time, of course, has been most recent.

Q. Have you examined the two together recently, at my request? A. Yes, I have, Mr. McInerney.

Q. And what is the result of that examination? A. Basically, I find that the Bowman Dairy quotation was predicated on a higher cost of raw milk, and a higher butterfat content. And that the Borden Company quotation, of course, was at a different level, and no consideration was given to the distinction.

And that basically if the Bowman Company had—Bowman Company's quotation had been constructed to the same levels of butterfat content and to the base cost of raw milk, that the net result would have been a more—it would have resulted in a quotation from the Bowman Company that would have very closely, very closely, approximated the Borden bid.

Q. Would the unit cost of the quart, half-gallon and gallon in the Chicago-Calumet area, in the Bowman bid, with the adjustments to which you have referred, have been lower or higher than the unit cost for those items that the Borden quotation shows? A. The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.

Mr. McInerney: Would you read that answer back, please?

(The record was read by the Reporter as follows:

[1816] "Answer: The Bowman quotation on quarts, half-gallons and gallons of Homo milk would have been lower from the Bowman Company.")

Testimony of Elmer Schmidt

The Witness: I erred, then. It should have been answered that the quotation on quarts, half-gallons and gallons, adjusted, would have been lower from the Bowman Dairy Company.

Judge Hinkes: Than Borden?

The Witness: Than Borden, yes, sir.

By Mr. McInerney:

Q. And I believe that you told us that the Bowman quotation was for either private label or Bowman label. A. Yes, sir, that is correct, and basically we overlooked that aspect in recommending to the Divisional Office, Mr. Bartels, that we purchase private label from the Borden Company.

Q. Sir, do you have before you Commission Exhibit 56 for identification?

Pardon me, in evidence. If you do not, I will give you a copy of it.

Looking at Commission Exhibit 56 for identification, does that give a quotation for brand label milk in the gallon jug? A. Yes, it does.

Q. And would you compare that quotation for brand label milk in the gallon jug with the quotation that the Bowman Dairy gave you?

Mr. Mathias: Your Honor, I would object to this [1817] witness making a comparison between two exhibits in evidence.

Mr. McInerney: Your Honor, I think I can shorten this, if you like. I think there is no problem with his looking at these. I am trying to make sense out of the documents because there are hundreds of pages here, and I am trying to ask the witness, basically, to compare the two quotations.

Testimony of Elmer Schmidt

And I think that, as a matter of fact, let me try it without the documents, if that is what the objection is.

By Mr. McInerney:

Q. Mr. Schmidt, have you at my request compared the Borden quotation for brand label milk in the gallon jug, with the Bowman quotation, for brand label or private label milk in the gallon jug? A. Yes, I have. I—

Mr. Mathias: Your Honor, I object. The item that is being discussed now was not even included in the negotiations. Mr. Schmidt has previously testified that the glass gallon jug was eliminated from the negotiations and from the final offer herein, because they did not want the gallon jug in the private label.

Mr. McInerney: The quotation from the Bowman Company includes a quotation on the gallon jug, and that is what was compared with the quotation from the Borden Company. Previously, the Borden Company had quoted the brand label price on the gallon jug. A & P was currently paying that price on the gallon [1818] jug from Borden and I submit it is obviously relevant.

Judge Hinkes: Did not both Companies also quote at that time a price on the gallon containers not in the jug?

Mr. McInerney: Yes, sir, but what I am getting to is a comparison between the glass gallon jug, in the Bowman quotation, vis-à-vis, what A&P was paying Borden for its glass gallon jug, which it was purchasing from Borden at that very time, in order to compare the two quotations, and the savings that might result.

Judge Hinkes: Very well; you may continue.

Testimony of Elmer Schmidt

By Mr. McInerney:

Q. What was the result of your comparison of the Bowman quotation on the glass gallon jug, and the Borden prices being charged to you for the glass gallon jug at that time? A. The Bowman quotation was ten cents-plus, a gallon cheaper.

Q. And approximately what was the order of magnitude of the A & P's purchases of the glass gallon jug from Borden at that time? A. On an annual basis, approximately one million gallons.

Q. And from that, what would you conclude would have been the cost saving to A & P from acceptance of the Bowman quotation on the glass gallon jug?

Mr. Mathias: Your Honor, I object to this line of questioning. The Exhibits are here, the pricing is here, it is all in evidence. It has been stated by the witness that the [1819] glass gallon jugs were specifically excluded from the final quotations on private label, at Mr. Schmidt's own request. I don't see relevancy of this line of questioning at all.

Mr. McInerney: Your Honor, that is a matter for argument later on.

Judge Hinkes: Mr. McInerney, is there any necessity for the witness reading the document to me? Can't that be done by me and presumably in your argument you make in your brief, in which you will specify the matter you are referring to in the documents?

Mr. McInerney: Your Honor, he is not reading now. He has already made a comparison and I think he had given us a comparison from which the arithmetic necessarily follows.

Judge Hinkes: I understand.

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Mr. McInerney: And I think Mr. Mathias is impeding the examination by not letting the witness complete his answer to the question.

Judge Hinkes: Let me put it this way, Mr. McInerney, I do not wish to have any witness simply tell me his mathematical calculations on a document which I can determine for myself.

Mr. McInerney: Your Honor, I think it goes beyond that. The witness is, I have asked the witness and he has testified that I have, to compare what he was paying, what A & P was paying Borden for the glass gallon jug with what the Borden offer was on the glass gallon jug.

【1820】 He has stated they made the comparison, and that it showed ten cents-plus per gallon, and that the purchases were approximately a million gallons per year. I am simply asking what the saving would have been to A & P by reason of that fact alone. I don't see that there should be much argument about it.

Judge Hinkes: Very well, go on. I just don't think there is much point in pursuing that line of inquiry if it is ascertainable by others independently of this witness. That is all. But you may continue.

Mr. McInerney: Thank you. I thought it would be really quicker at this point, Your Honor, if we could just put this figure in the record at this point.

By Mr. McInerney:

Q. Did you tell us, Mr. Schmidt, what the savings would have been from A & P from accepting the Bowman quote on the glass gallon jug? A. That saving would have approximated \$100,000 a year.

Q. Thank you. On that one item alone? A. Yes, sir.

Q. Sir, in your direct testimony, I believe that you men-

Testimony of Elmer Schmidt

tioned that Mr. Gose of the Borden Company at one point in time told you that Borden was supplying private label milk to a customer by the name of Eagle Stores. Is that correct? A. That is my recollection, Mr. McInerney.

Q. And what is it that you recollect about that, what causes [1821] you to recollect that? A. It is my recollection that Mr. Gose came in one day with a lower quotation on private label milk, for our stores in the Waukegan, Northern Illinois section, and he indicated that these prices were being lowered to us because they had acquired a private label business at the Eagle chain.

Q. Where did the Eagle chain operate? A. Their headquarters basically were in Milan, Iowa, a suburb of the Quad City general area. They have stores in Iowa and in the Northern section of Illinois, Rockford and as far East as Waukegan.

Q. And was the reduction to A & P only in those areas where Borden was supplying private label milk to A & P and the Eagle stores were also operating? A. That is my recollection, yes, sir.

Q. And was this a reduction that was not solicited by you in any way? A. That is right.

Q. Apart from receiving information such as this from Mr. Gose, do you recall any other instance that led you to believe that you were paying Borden more for private label milk than other people were paying for their milk, if you recall? A. Would you mind restating that question, Mr. McInerney, please?

Q. Yes, sir. After the private label arrangement went into [1822] effect, and Borden was supplying private label to A & P, apart from this incident with respect to the Eagle stores, did anything else happen that you can now recall that led you to believe that you were not getting the best possible price from the Borden Company? A. They would be in the area of speculation, Mr. McInerney. Nothing specific that I can recall.

Testimony of Elmer Schmidt

Q. Do you recall any conversations with a Mr. James McMahon?

Mr. Mathias: Your Honor, I believe that if this is probing the witness' area of speculation, that it would be objectionable.

Mr. McInerney: It is an attempt to refresh his memory. If it cannot be refreshed, I will drop the subject.

Judge Hinkes: You may continue.

The Witness: I do recall having conversations with Mr. McMahon, yes sir.

By Mr. McInerney:

Q. And does that help to refresh your recollection as to whether there might have been lower prices obtainable, than you were paying Borden for private label milk? A. He intimated to me that in his opinion—

Mr. Mathias: Your Honor, I am going to have to object to this line of questioning. There has been no identification of Mr. McMahon, what the circumstances of this conversation were.

* * * * *

【1826】 Judge Hinkes: Be that as it may, I don't think this witness again is in a position to tell us what the contract provides. The contract is in evidence now, and you may make your argument from the contract one way or the other. I don't think this witness, however, is in a position to tell me what the contract means.

Mr. McInerney: Your Honor, I think, again you can, if the Commission Counsel persist in saying that the document speaks for itself, and we have to keep referring back to the document, I am afraid

Testimony of Elmer Schmidt

we are going to lose some of the continuity of the testimony.

I would like to ask the witness, apart from the document.

By Mr. McInerney:

Q. Can you tell us whether it was customary for dairies to adjust the butterfat contents of their products at the request of a customer, such as A & P?

Mr. Mathias: Your Honor, I object. There has been no foundation laid for this question at all. As a matter of fact, on direct, and cross-examinations by Mr. McInerney, this witness has stated that he was not an expert in dairy matters.

Judge Hinkes: Be that as it may, I will allow the witness to answer. If you know, Mr. Schmidt.

The Witness: If I know? If I knew then?

【1827】 *By Mr. McInerney:*

Q. If you know now, is what I was asking. A. If I know now?

Yes, sir.

Q. And your answer to the question is? A. Yes.

Q. Thank you. This proposal, Commission Exhibit 94, from the Dean Milk Company, also indicates that by developing a preordering system at the store level, further savings would result of a little over three mills per point.

In analyzing this proposal, did you make the adjustment in butterfat content, and in the preordering savings in comparing what the prices were that Dean was quoting as against the prices that the Borden Company was quoting you?

Did you make that comparison at the time that you received this Exhibit? A. (No response.)

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Q. If you would like to look— A. It is my recollection, Mr. McInerney, that I did make such a comparison, and I do recall having seen a document which was a copy of that worksheet.

Mr. McInerney: May we see Commission Exhibit 95? I have it here.

* * * * *

【1841】 By Mr. McInerney:

Q. Would you like the question reread or restated? A. Yes, please.

Q. Do you know whether it was public knowledge what dairies such as Borden would charge chain store customers, including any discounts, in other words, what the net price would have been? A. No, I did not know.

Q. You did not know the prices, or, in other words, what I am asking you is: do you know whether or not the dairies' prices to the chains in general were common knowledge, but what net prices the dairies charge chains? A. That was not common knowledge.

Q. And did you personally have such knowledge? A. No, I did not.

Q. Now, sir, you were shown on your direct examination Commission Exhibit 102, and at that time I tried to ask you something with respect to certain markings at the bottom of it. Again I would like to get a copy that has no other notations.

Judge Hinkes: You may use this one, if you like.

Mr. McInerney: Thank you, sir.

By Mr. McInerney:

Q. Would you look at Commission Exhibit 102B, if you please. A. Yes, sir.

【1842】 Q. I think you testified that the handwriting at

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the bottom of that page was yours, the handwriting that concludes "can be substantiated". A. Yes, sir.

Q. Now, where did you get the information that this could be substantiated? A. It is my recollection that I received that information from Mr. Gose.

Q. And did you simply write down what Mr. Gose told you, or were you able to substantiate it some way yourself? A. No, I merely wrote down what Mr. Gose had indicated.

Q. Now, can you tell us in this private label arrangement with Borden, I think you testified that at one point there were some Iowa stores of A&P that might have been served with private label by Borden, but that they were stricken out. Do you recall that yesterday? A. Yes, sir.

Q. Now, my question is: was all of Iowa eventually excluded from this private label arrangement? A. Yes, sir.

Q. Now, in the course of these negotiations, or otherwise, did you or did anyone from A&P in your presence ever discuss with anyone from Borden the retail price at which A&P would sell private label milk or other products out of A&P stores? A. No, sir, they did not.

【1843】 Mr. McInerney: May we have a short recess, Your Honor?

Judge Hinkes: Very well. Take a short recess at this time.

(Brief recess.)

Mr. McInerney: We have no further questions.

Judge Hinkes: Mr. White.

By Mr. White:

Q. Mr. Schmidt, I believe during the course of your testimony for the last approximately two days you mentioned that during the negotiations with Borden concern

Testimony of Elmer Schmidt

ing the private label that you dealt with Gordon Tarr, Ralph Minkler and Joseph Malone. Is that correct? A. Yes, sir.

Q. Not all at the same time, but at one time or another? A. Yes, sir.

Q. In your dealings with Gordon Tarr, did you find him to be honest and forthright? A. Yes, I did.

Q. Would the same be true of Mr. Minkler? A. Yes, sir.

Q. And Mr. Malone? A. Yes, sir.

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【1850】 * * *

Q. Is that the only meeting that you had with Mr. Minkler that related to the private label negotiations? A. That is the only meeting with Mr. Minkler that I can specifically recall.

I do have a general recollection that Mr. Minkler was at my desk on several other occasions. I believe that he could have been at my desk with Mr. Malone and Mr. Tarr when that Chicago-New York comparison was given to me.

Q. I see. And he might have met with you on other occasions? A. He might have been there, yes, sir.

Q. When Borden made price changes in milk products sold to A&P, were you notified of those price changes? A. Yes, sir.

Q. And was that notification given to you normally by Gordon Tarr? A. Yes, sir, and then later by Mr. Gose.

Q. Mr. Schmidt, I show you a group of documents marked Commission Exhibit 153 and ask you if those are price change notices of the type that were delivered to you from time to time by Mr. Tarr or Mr. Gose or others from Borden. A. Yes, sir. This is the type of form that they used in bringing us price changes.

Q. Mr. Schmidt, you stated that at the conference with Mr. Minkler and Mr. Tarr in Libertyville in late Septem-

Testimony of Elmer Schmidt

ber of [1851] 1965 that you at that time requested Borden to supply a letter concerning the availability of pricing. Do you recall your testimony in that regard? A. Yes, sir.

Q. Are you quite certain that that transpired at that meeting, or could that have happened on another occasion? A. I believe that it transpired at that meeting, Mr. White.

Mr. White: Thank you.

That is all.

Judge Hinkes: Mr. Mathias.

Mr. Mathias: No redirect, Your Honor.

Judge Hinkes: Any further examination, Mr. McInerney?

Mr. McInerney: No, Your Honor.

Judge Hinkes: Thank you, Mr. Schmidt. You may step down.

The Witness: Thank you.

(Witness excused.)

* * * *

Testimony of Ira Bartels

July 10-11, 1973

* * * * *

【1853】 Q. Are you retired? A. Yes, sir.

Q. And what was the place of your last employment, sir?
A. Chicago, Illinois.

Q. And with what company, sir? A. Great Atlantic and Pacific Tea Company.

Q. And are you on a retirement pension from that concern? A. Paid for by the concern. The annuity policy is from the Prudential Insurance Company.

Q. When were you last employed by A&P, sir, in Chicago? A. Well, I left the office on April 17th, 1970.

Q. And just prior to leaving in April of 1970, what was your position with the A&P Company? A. I was Purchasing Manager of the Chicago Division.

Q. And how long did you hold that position, sir? A. From beginning the previous March, about 13 months.

Q. That would be March 1969? A. March 1969. March 1st, 1969.

Q. And prior to March 1st, 1969, what had been your position with the A&P Company, if any? A. From 1964 until the end of February 1969 I was Director of Purchases, of the Middle Western Division.

Q. I think Mr. Schmidt has already testified that approximately this period of time, in 1969, that there was a change in the divisional setup in A&P, and I take it that as of 【1854】 March 1st, 1969, the Middle Western Division was dissolved and what had been the Chicago Unit now became the Chicago Division. Is that correct, sir? A. That is correct.

Q. And do you recall what month in 1964 you became the Director of Purchases for the Middle Western Division, sir? A. I believe it was the latter part of August.

Q. August of 1964? A. August or the early part of September.

Testimony of Ira Bartels

Q. Now, prior to becoming the Director of Purchases for the Middle Western Division in August or September of 1964, had you been employed by the A&P Company? A. Yes, sir.

Q. And what was your position prior to that time, sir? A. I was Unit Buyer in the Chicago Unit, as the terminology existed at that time.

Q. And how long had you held that position, sir? A. From December of 1960.

Q. And I take it this was the position that was later occupied by Mr. Elmer Schmidt after you became Director of Purchases of the Division. A. That is correct.

Q. Now, as Unit Buyer, were you the head of purchases for the Chicago Unit during this period from 1960? A. Yes, sir.

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【1862】 Q. Was that prior to or subsequent to this message, sir? A. I believe it was the next morning.

Q. And what was the nature of that conversation, sir? A. Well, I wanted to be sure I understood what he was talking about, and other than this particular message. And basically that was about it. I may have at this time expressed my opinion that I thought it might be too early to generally go out and solicit bids because we as yet didn't know whether we wanted or—or as I understood it the Chicago Unit hadn't actually decided whether they wanted private label milk.

Q. Had you at any time prior to this occasion discussed the question of private label milk for the Chicago Unit or the other Units under your control with Mr. Smith? A. Yes.

Q. On what occasion was that, sir? A. I believe at a meeting in New York, along about November or December, I believe it was one of the topics that were discussed.

Q. This was November or December of 1964, sir? A. That's right.

Testimony of Ira Bartels

Q. And in what manner was this discussed at that meeting? A. Well, as I recall it, I think he had information on the arrangement he had made for private label milk, I believe in New York, or not he had made but somebody had made, I believe in New York, and it was a suggestion that perhaps all [1863] Purchasing Directors should look into it for their particular areas.

Q. And did he provide you with information for your consideration concerning the nature of the private label arrangement in New York? A. Yes. I can't recall whether it was at that meeting or subsequently.

Q. And was there any discussion of private label programs that A&P Units in other parts of the country might have had in effect, at this meeting? A. No, frankly, I don't recall any.

The one sticks in my mind, though, but I don't recall whether there was any on the others or not. There may have been some comments from some of the other Purchasing Directors, but I can't recall.

[1864] Q. Now, at the time that you did obtain some information from him concerning the New York private label arrangement, whether that was at this November-December meeting or at a later date, just what did Mr. Smith supply to you? A. Well, as I remember, he supplied what he mentioned was a reasonable formula in the pricing of private label, which was two cents for processing and delivery, two cents for cartons, and two cents for overhead and profit, on a per-quart basis.

Q. And this was based upon New York— A. That is a rough approximation, evidently, but he said he found that to be sort of a benchmark.

Q. And did he provide you with a copy of the arrangement which was in existence in New York? A. I don't recall that he did. I don't believe so.

Q. Was Mr. Smith's approval necessary in order for the people in the Chicago Unit to seek to change to private

Testimony of Ira Bartels

label? A. His approval would have been his or through him. Who actually approved it in New York, I don't know. But it would have had to have their, New York's, approval to make the change.

Q. Now, when you reported to New York on a milk and dairy matter, who did you report to? A. Herschel Smith.

Q. Now, Mr. Bartels, do you recall when the first contacts were made in the Chicago area, for the supply of private label milk? [1865] A. I believe it was in early February, before the 15th of February, 1965.

Q. That was shortly after this message from Mr. Smith? A. That is right, yes.

Q. And who was involved in these contacts? A. Mr. Schmidt.

Q. Now, generally speaking, throughout the course of the negotiations, who handled the negotiations between A&P and whatever, and whatever dairies were contacted concerning the supply of private labels. A. Mr. Schmidt.

Q. And for the record's sake, when you speak of Mr. Schmidt, you are talking of, S-c-h-m-i-d-t, rather than the first? A. Well, I should say Elmer Schmidt.

Q. Elmer? A. Maybe I should use the first name.

Q. Now, during the course of the negotiations, did Mr. Smith, or did Mr. Schmidt, rather, Elmer Schmidt, report to you upon the developments as they occurred in the course of the negotiations? A. Yes, or within a short time after he had had an opportunity to analyze them.

Q. But you were kept informed as to the developments in the course of the negotiations? A. Well, I was informed as to the progress, not necessarily [1866] all conversations or developments, but he would tell me when he got a quotation and he would tell me what he didn't get in it, and that type of thing.

Q. Did you have frequent meetings with Mr. Schmidt during the period February, 1965, concerning the course and conduct of the negotiations? A. Well, they were not

Testimony of Ira Bartels

meetings, actually. They were when he might tell me that well, I still don't have this or I got this today, and I will pass it on to you tomorrow or the next day or something of that nature.

It was not where we sat down and talked about it. I mean, after all, we are in the same building on the same floor and probably 30 feet apart from one another.

Q. You were in very close proximity to each other? A. That's right. Maybe 30 feet is too short; maybe I should have said 70 or 80 feet.

Q. In fact, you were in daily contact with one another? A. Yes. In fact, to go to the washroom, I had to walk past his department.

Q. Mr. Bartels, I hand you Commission Exhibit 23 A through I, 24 A through F—or 24 A through G; 25 A, 26, 27, and 28 and ask you if you have seen these documents before, sir. A. 23 A, B, C, D, E, F, G, H, and I, I have seen that one before.

Q. And was this presented to you, Mr. Bartels, by Borden **【1867】** personnel? A. Yes.

Q. And do you recall which Borden officials presented it to you, sir? A. Well, there was Mr. Malone, and I believe Mr. Minkler. I am sure Mr. Minkler was there, but I am not quite sure whether Mr. Tarr was there or not.

Q. But at least Mr. Minkler and Mr. Malone were present at this meeting? A. Yes. But there was somebody else, there were three people.

Q. Is this the one meeting you had at which Mr. Malone was present at the negotiations? A. Yes.

Q. And you don't recall the approximate date of that meeting? A. I can't recall. It was in, I believe, probably the early summer, late spring or early summer of 1965.

Q. Now, Mr. Bartels, I hand you Commission Exhibit 34 for identification and ask you if you can identify this document, sir. A. Yes.

Q. And what is it, sir? A. Well, it is in my handwrit-

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ing, indicating the summary of one subject of conversation with Herschel Smith on August 11.

Q. And on this date then, you had had a telephone conversation **【1868】** with Mr. Smith? A. Yes.

Q. And this is a notation you made during the course of that or following that telephone conversation? A. That is correct.

Q. I note in the second, the last two lines of the note, it is stated also send him info from Borden on comparative costs. Do you have any recollection as to what information is referred to in this sentence, sir? A. No, I don't. I can't recall what that is.

Q. Is it possible that this would have been, or, correction, would reading Commission Exhibit 23-A, or looking through Commission Exhibit 23 A through I, refresh your recollection in this regard, sir?

Mr. McInerney: In regard to whether it is possible?

Mr. Mathias: No, I didn't ask him about any possibility.

Mr. McInerney: Well, may we know what the question is, Mr. Mathias, I am not sure I understand it.

Mr. Mathias: I will rephrase the question, rather than having it reread.

By Mr. Mathias:

Q. Mr. Bartels, does the reading of Commission Exhibit 23-A through -I refresh your recollection as to what is meant by the notation on CX-34 also send him info from Borden on comparative **【1869】** costs? A. No, it doesn't.

Q. Are you familiar with any other information which you received from Borden concerning comparative costs?

Testimony of Ira Bartels

A. I don't recall any. This New York, I think, was the only one that I recalled.

Q. Now, do you recall whether or not you did send him information on comparative costs, that is, with Herschel Smith? A. I know I did not send him this.

Q. That is CX-23? A. That is right. I know I did not send him that. But again, as I can't remember what that referred to, I may have sent him something but I am sure it wouldn't pertain to this subject. I think I would remember that.

Q. Now, Mr. Bartels, can you recall anything else that occurred in this conversation with Herschel Smith on August 11? Did you receive any other instructions from Mr. Smith? A. Well, I can't recall any.

Q. Did you discuss the question of receiving additional bids on your private label business in that conversation? A. Obviously we did, because that is what my notes said that he suggested that we, which we have previously talked about, he suggested that now we go ahead and do that if we wanted to.

Q. All right. Now, you have mentioned a previous suggestion. When did this previous suggestion occur? [1870] A. Well, that might have happened during several conversations beginning back in February.

Q. Do you recall having several conversations during the interim with Mr. Smith concerning this subject? A. Well, let me put it this way, I recall conversations with Mr. Smith, not several pertaining to this one subject. The basic difference, I think, in what we were trying to reconcile here is my feeling at the beginning that perhaps we shouldn't just go out everywhere and solicit bids, because the decision had not really been made by the unit that they really wanted private label milk.

Q. But during the course of this time, you were discussing the private label negotiations with Mr. Smith on a regular basis from February through August? A. Not

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regular. It would be on an irregular basis, let's put it that way.

Q. But you did have several conversations with Mr. Smith. A. Yes, I had several, many conversations with Mr. Smith, because they might pertain to Milwaukee or they might pertain to St. Louis, they were not always necessarily on milk nor were they necessarily on Chicago.

Q. Well, do you recall discussing the Chicago milk situation with Herschel Smith in conversations during this period of time? A. I would say at least twice.

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【1866】 * * *

Judge Hinkes: Well, it is argument in any event. I will allow it.

Mr. Mathias: Rather than cause the reporter to go all the way back through the record, I will try to recall the question as closely as I can.

By Mr. Mathias:

Q. In 1969 and during your later period as purchasing director for the Chicago division, had there been any significant changes in the market share positions of these chains that you have named from that which they had held in 1964, the period 1960 to 1964 which you previously described? A. As I recall it, there was. Jewel Tea experienced a further substantial increase in their share of the market. National Tea, a very slight change. I can't recall whether it was up or down but approximately the same.

A&P dropped substantially and Kroger remained about the same.

Q. Was Kroger still below A&P in sales volume, in market share, in your opinion? A. I can't recall that at that time specifically but I believe so.

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Testimony of Ira Bartels

【1892】 * * *

Q. When you say three sections, do you mean three sections comprising an entire quotation for the entire area?
A. Yes, sir.

Q. Now at the time that you submitted this to Mr. Smith, to Herschel Smith, Borden had given you a revised quotation, is that correct? A. That is correct.

Q. Is it customary at A&P to permit a vendor or supplier to submit a second quotation with respect to a particular commodity or line of products? A. Mr. McInerney, to answer the question, it is not customary to do that. In this particular instance, as I believe I stated an answer to a question yesterday, in the beginning we had not decided or the Chicago unit had not decided that they were definitely interested in private label milk.

Our first request to Borden was of an exploratory nature and at that particular time we did not feel, because of our uncertainty as to the ultimate decision that we wanted to, you might say, tip our hand to our competitors as to what we were thinking about.

It was also our intention to, when we once made the decision that we were interested in private label milk, to follow our usual custom of securing of multiple quotations
【1893】 or quotations from anybody that was interested in having the business.

Q. My question, sir was—I believe you have answered my question but let me put another one. You have said that it was not customary in such a situation to permit a supplier to give you a second quotation.

My question now is, why was Borden permitted to do so in this instance? A. Basically because their quotations had spanned a considerable period of time and we felt that it would be fair to tell them or give them the opportunity of either standing on their quotation or submitting a revised one updated to the same time that the other companies were submitting them to us.

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Q. Turning your attention to Commission Exhibit 263 which you have in front of you, did you at the time that you submitted that to Mr. Smith, make a detailed analysis of the two quotations, that is the Bowman and the Borden quotations that accompanied your letter to Mr. Smith? A. I did not. I used the analysis prepared by the Chicago unit.

Q. Turning your attention to 263H, would you tell us please what that is? A. That is the letter we received from Borden pertaining to their quotations on private label milk dated September 21.

【1894】 Q. Was it customary at A&P to receive such a letter from a prospective supplier when they were giving you a quotation? A. Yes, sir.

Q. Did you at this time or at any other time prior to October 1, 1965, which is the date of this letter, have any discussion with anyone from the Borden Company with respect to obtaining assurances such as are contained in their letter which has been marked 236-H? A. Yes, that was in February, I believe, or thereabouts, of 1965, and I believe subsequent to the time that Mr. Schmidt had asked the Borden Company for quotations on private label, if they were interested.

Q. Will you describe please what was said and who was present on that occasion? A. Mr. Fagerson from the Borden Company, Mr. Minkler from the Borden Company that I can remember. I can't distinctly remember or identify any other Borden people who may have been there but there may have been one more.

Q. Will you describe the conversation as best as you can recall it? A. The conversation I believe, as I recall it, started out with a bit of a sales pitch against the idea of private label in a mild way.

When I indicated that we wanted to proceed with this exploratory thing, I asked them whether that would pre-

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sent [1894-A] any problem to them as far as availability for their other customers of private label. As I recall it, Mr. Fagerson said that wouldn't present any problem at all to them.

Q. Were you ever told by Mr. Schmidt or anyone else that this Borden quotation that you forwarded on to Mr. Smith was given to meet competition? At the time that you forwarded it to Mr. Herschel Smith did you believe that this quotation was cost justified? A. Yes, I did.

Q. What was the basis for that belief? A. The basis was that the Bowman quotation, which indicated they had included six percent, as I recall it, or a certain percentage for profit, was comparatively close to it.

As I recall it, the formula that was brought up before, the 2-2-2, was exceeded in the Borden quotation. I also had a great deal of confidence in the Borden Company in their knowledge of the dairy business, being one of the oldest, I believe, and the fact that it was a large company and had what I thought were very sophisticated cost accounting and legal departments.

Q. Did you have any discussion with anyone from Borden prior to the submission of this quotation with respect to Borden's Woodstock plant? A. Oh yes, while that plant was under construction, beginning with the time that it was under construction they kept [1895] assuring us or they told us—let us put it this way—that it was designed to be the most modern dairy plant in the world and when it was in operation it should produce substantial economies and that it was their intention to pass along to their customers a portion of those economies.

Mr. Shaefer: Your Honor, I have to object to the witness' speaking and attributing general statements to Borden without some specific frame of reference either to the time period, the persons involved or

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something of that sort. Now the statement insofar as they apply to Borden are completely hearsay.

Mr. McInerney: I don't think they are hearsay, Your Honor. I will ask the witness [redacted] he can tell us who discussed the Woodstock plant with him, who from Borden.

The Witness: Over the period of time there would have been Mr. Tarr, Mr. Minkler, I believe Mr. Gose and I believe Mr. Walter Heddon.

By Mr. McInerney:

Q. Who is Mr. Heddon, sir? A. Mr. Heddon was the Borden employee who apparently devoted most of his time to labor work.

Q. Was the efficiency of the Woodstock plant mentioned to you by Borden executives on more than one occasion? A. Oh yes. I can't recall how many but several occasions.

【1896】 Q. I think you made what might seem to be a rather cryptic reference to a two-two-two formula which you did mention yesterday, but for the sake of clarity in the record, will you tell us what you mean by the two-two-two formula? A. Well, as I believe I explained it yesterday, that was information that Mr. Herschel Smith gave me that a yardstick or benchmark on private label would be two cents over the cost of raw milk for processing, two cents for delivery, and two cents for the carton and in the processing, of course, I should have said processing and profit, that would fall in there, and those figures would be per quart.

Q. Now, would the figures for the half gallon be the same? A. Approximately. I can't recall. There may have been a very small fractional difference in them.

Q. In which direction? A. Probably slightly less at this particular time.

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Q. So that the benchmark that you would use for the half gallon would not be precisely 12 cents added to the cost of raw milk but would be something less than that, is that correct? A. That is correct, but the difference would be very slight.

Q. Now, sir, at the time that you sent your letter of October 1, 1965 to Mr. Smith, that is Commission Exhibit 263(a), with the attachments, did you believe that the Borden offer was preferable to the Bowman offer? **【1897】**
A. Yes, I did.

Q. I notice that there is not with the Bowman offer a letter comparable to the one marked 263(h) from the Borden Company. That is their letter of October 1, 1965 to Mr. Elmer Schmidt. Can you explain the absence of such a letter from the Bowman Company? A. It was not our practice, when asking important quotations, to include the request for the availability letter as part of our request to the various companies, and only after we had decided which company seemed to be the one we wanted to supply to us the merchandise, then we would go to them and ask for the availability letter.

Q. Have you recently, at my request, made a more detailed comparison of the Bowman and the Borden offers that are contained in Exhibit 263? A. I have.

Q. And what is the result of your analysis? A. The analysis shows that Bowman was quoting on a 3.5 butter fat basis compared to a 3.4 for Borden. The Bowman quotation started with a \$4.32 a hundredweight, I believe, price on raw milk and the Borden quotation started with a \$4.29 price on raw milk.

The Bowman quotation covered both private label or the Bowman brand. We could take our choice. The Borden quotation covered only private label and that became significant in **【1898】** the price of gallon glass bottles of milk, which we did not want to handle under private label but under the dairy's label.

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As I recall the analysis I made at your request, there was a difference in the price between what we were paying Borden for gallon glass milk and Bowman's proposal of slightly over ten cents per gallon lower for the Bowman label.

As I recall the figures, we used something over a million gallons a year, which would result in a saving of roughly \$100,000 by changing to the Bowman brand and in the case of the difference in butter fat and the price of fluid, three cents difference in the price of fluid milk, that would bring the cost of the major items on the Bowman brand—that is, the quarts and half gallons of milk—below the Borden quotation for private label.

Q. Was that also true on the quotation for gallons as well in private label? I think you mentioned quarts and half gallons. A. Yes, it would be true for gallons.

Q. So that the net price per unit from Bowman would be less than the quotation of Borden when both were put on a comparable basis, is that correct? A. That is correct.

Q. Now, you mentioned that the Bowman quotation was for either private label or brand label. Did the private label program involve additional expense to A&P as compared to [1899] selling brand label? A. Yes, it did. It involved additional expense where the method of delivery was changed to a store dock delivery instead of its being placed in the coolers or cases. It meant the elimination of servicemen as contrasted to deliverymen who would visit the stores and service the cases and do the rotating, a large share of the rotating, date freshness control rotating.

It, of course, meant that we would have to spend our money to promote the private label instead of relying on the dairies' promotional efforts.

Q. Let me interrupt you there, if I may. With respect to the previous items you mentioned, apart from the promotional expense, wasn't the Bowman offer on the basis of eliminating many of those services as well as the Bor-

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den offer? Weren't they comparable in that respect? A. Oh, yes, both were comparable in that respect.

Q. With respect to the promotional expense, would there have been an additional saving to A&P to take a brand label at prices such as those quoted by Bowman rather than going into the private label program? Do you understand my question? A. Yes, I believe I do. I believe there would be, to the extent of what the advertising expense would be.

Q. The Chicago consumer did not know of an A&P brand milk at this time in October 1965, is that correct? **【1900】**
A. That is correct. Of course, that was one of the concerns we have had early in not making a decision without exploratory work that was involved in the private label.

Q. Was the Bowman label well known in the Chicago market? A. Yes, sir.

Q. Now, as a result of all these considerations that you have testified to, comparing the Bowman bid with the Borden bid, what is your present opinion with respect to the relative value of these quotations to A&P? Which was the better quotation? A. Well, the Bowman quotation was better.

Q. Would you look again at Borden's letter, which has been marked Exhibit 263(h), and tell us what you understood the letter to mean when you received it?

Mr. Mathias: Your Honor, I would object to this witness testifying as to what he understood it to mean unless some basis is laid for showing that there was a basis for that understanding.

Judge Hinkes: I don't know that this witness is qualified to state the meaning of words used by someone else as to his impressions, I don't know whether that is at all pertinent.

Mr. McInerney: I think it is on the issue of good faith, Your Honor. I think he did read it at or about

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the date it bears, and I am asking him what his understanding was [1901] at that time. I don't know what basis further than that I can lay for it. I think there is no need for a further basis.

Judge Hinkes: I will allow the witness to answer on the issue of good faith, as you put it.

The Witness: Would you please repeat the question?

By Mr. McInerney:

Q. Looking at 263(h), that letter of October 1, 1965 from the Borden Company to A&P, when you read that on or about October 1, 1965, what was your understanding of the meaning of that letter? A. I understood it to mean that their prices were legal and proper in every respect and that they were prepared to prove that such was the case.

Q. What was your understanding with respect to their making the prices available to others?

Mr. Schaefer: Objection to that question, Your Honor. No foundation laid for the whole area of making the prices available to others.

Mr. McInerney: I think there has been a foundation, there was testimony with respect to a conversation he had with Borden.

Mr. Mathias: Back in 1965, before, he states, they were very seriously engaged in negotiations with Borden.

Mr. McInerney: I don't think this is the proper time for that kind of argument.

* * * * *

[1912] Now, the question is, what was your understanding of that language at that time?

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The Witness: May I have my previous answer read or do you want me to start from the beginning?

Judge Hinkes: If you wish, you may start from the beginning, whatever way you prefer.

Mr. McInerney: If you would like your answer read, His Honor will allow it to be read.

Judge Hinkes: Will the reporter find it once again?

(The record was read by the reporter.)

By Mr. McInerney:

Q. I think the question is, what do you now recall about what you understood the language to mean? A. In my previous statement, I said in every respect, which included in my mind that it was available, or would be available, of course, on a proportionately equal basis to all their customers, that it would not be below cost or that it could be cost justified, and that they were in a position to prove that it met every legal requirement.

Q. Now, sir, had you had any discussion with Mr. Elmer Schmidt on the subject of the availability of Borden's prices to other Borden customers prior to your receipt of that letter? A. Yes, sir.

Q. Would you tell us the substance of that discussion?

* * * * *

【1924】 * * *

Mr. McInerney: Your Honor, at this point, I would like to show those exhibits to the witness unless Your Honor has some further question he would like to explore at this stage.

Mr. Schaefer: Your Honor, may I interject that there has been no foundation laid as of yet for showing the witness the documents. The witness'

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independent recollection of any of the events or matters covered in those documents has not yet been probed and in such a posture, it is inappropriate to show documents to him.

Mr. McInerney: I don't think we have to exhaust the witness' recollection but that is the purpose of my making the statement.

Judge Hinkes: These letters, I presume, are being offered to be shown to the witness for identification purposes. Is that right?

Mr. McInerney: Yes, sir.

Judge Hinkes: I am going to allow that. Whether or not this witness is the one who can authenticate the documents, I don't know but at least the attempt cannot be denied.

Mr. McInerney: Thank you, sir.

By Mr. McInerney:

Q. I show you what has been marked A & P Exhibits 16, 17 and [1925] 18 and I would like you to look at those letters and tell us what they are or what you know about them.

Judge Hinkes: Can you identify those letters, Mr. Bartels?

The Witness: I can identify this first one. I have not read the others.

Judge Hinkes: The first one, August 3, what do you know of it?

The Witness: That was sent to me in connection with a proposal to service stores as identified in the letter and I in turn forwarded it to Mr. Herschel Smith in New York.

Judge Hinkes: It is addressed, however, to Mr. Nelson and not to you. Can you explain that?

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The Witness: Mr. Nelson was the Unit Buyer in St. Louis, and, of course, would have forwarded this to me along with the schedule of proposed prices.

Judge Hinkes: Did he forward this letter to you?

The Witness: I recall that he did.

By Mr. McInerney:

Q. May I ask what your position was as of the date of that letter? A. In 1967, I was purchasing Director of the Middle Western Division.

Q. Did that include Mr. Nelson's Unit increase?

Mr. Schaefer: I think the question is whether the [1926] witness recalls this specific document.

Judge Hinkes: I believe he answered that he did recall.

By Mr. McInerney:

Q. Will you look at the next letter, please sir? A. Yes. The two came in together, as I recall it. They referred to the same proposal. Both the August 3 letter and August 8 letter were submitted by Mr. Nelson to me with the proposal at that time.

Mr. McInerney: I offer those in evidence, Your Honor.

Mr. Schaefer: I object to that, Your Honor, on several bases and request voir dire of the witness with respect to these items.

Judge Hinkes: Perhaps before we get into that, we ought to recess because I can see where this might involve some extensive discussion. If I am wrong, of course, tell me and I will allow you to be on now, Mr. Schaefer.

Mr. Schaefer: I think that is right, Your Honor, that would be best.

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Judge Hinkes: We will, therefore, recess at this time and resume in this room at 1:30 p.m.

(Whereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. the same day.)

【1927】

AFTERNOON SESSION

1:30 p.m.

IRA R. BARTELS resumed the stand and testified further as follows:

Cross-Examination (Resumed):

Judge Hinkes: The hearing will be in order.

You were going to conduct some voir dire at this point, Mr. Schaefer?

Mr. Schaefer: Yes, sir, thank you.

Voir Dire by Mr. Schaefer:

Q. Mr. Bartels, calling your attention once again to the two documents that have been marked Respondent A&P's Exhibits 16 and 17, these are letters dated August 3 and August 8, 1967. Just to make sure the record is clear, Mr. Bartels, do you now recall having seen these letters on or about the date that they bear in the year 1967? A. It would be shortly after the eighth of August, 1967.

Q. My question is just whether you are recalling that you would have gotten them or whether you specifically recall seeing them at some point in late 1967? A. I recall seeing them.

Q. Mr. Bartels, were you personally involved in the negotiations to which these two letters relate? 【1928】 A. I was not.

Q. Did you have any contact with any Borden personnel with respect to the proposals to which these two letters relate? A. No.

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Q. Were these letters forwarded to you with some covering letter or memorandum? A. They were forwarded to me with a covering letter and the attachments which were the proposal.

Q. Do you know, Mr. Bartels, why the letter dated August 8, the one which is marked Respondent A&P Exhibit 17, do you know why that letter was written? A. I have no idea.

Mr. Schaefer: I have no further questions on voir dire, Your Honor.

Judge Hinkes: The documents have been offered in evidence. I will hear objections if there are any.

Mr. Schaefer: I would like to ask first, Your Honor, whether these documents are being offered with respect to Count 3 of the Complaint.

Mr. McInerney: Your Honor, I am offering them as part of A&P's defense. I am not directing them against Borden or with respect to any allegation against them. I find it difficult to respond to Mr. Schaefer.

Mr. Schaefer: The problem, Your Honor, is, as you might anticipate from my comments this morning, one of our [1929] objections to the admission of these documents relates to whether any showing of relevance to this proceeding has been made.

The questions of relevance as to Counts 1 and 2 are very different in many respects from the question of relevance to Count 3.

Mr. McInerney: I agree with Mr. Schaefer. I think they have more relevance to Counts 1 and 2.

Judge Hinkes: If you have objection with reference to relevance to Count 3, you may persuade me—

Mr. Schaefer: I was wondering whether A&P was offering them—

Judge Hinkes: I think Counsel for A & P is offering them in defense of its own position and not

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necessarily as attack on its co-Respondent. However, Complaint Counsel will be entitled to use this document for that purpose unless it is restricted.

Mr. McInerney: If there is any way of shortening this by my saying I am offering it with respect to Counts 1 and 2, I will do that because I do think they are much more germane to those Counts.

Judge Hinkes: You may make that limited offer and it will be received for that purpose only. Then it will be up to Complaint Counsel to use them for other purposes if he wishes to but that will have to be on a separate offer.

【1930】 Mr. Schaefer: In that regard then, Your Honor, since Borden is not a party to either Counts 1 and 2, I don't think it is necessary for us to further pursue our objection to the admission of these documents.

Judge Hinkes: Very well. Mr. Mathias, any objection?

Mr. Mathias: No objection, Your Honor.

Judge Hinkes: Respondent A & P Exhibits 16, 17 are received and are limited to Counts 1 and 2 of the Complaint.

(The documents referred to were received in evidence limited to Counts 1 and 2 of the Complaint.)

By Mr. McInerney:

Q. Mr. Bartels, I believe you have in front of you another document which has been marked C-A & P X-18. Do you have that in front of you, sir? A. Yes, sir.

Q. Would you examine that, please, and then tell us what it is?

Mr. Mathias: Your Honor, not to interrupt, but for clarification of the record, but the exhibit Mr.

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McInerney mentioned has been marked R-A & P X
18-A & B.

Judge Hinkes: Yes.

Mr. McInerney: Thank you.

Judge Hinkes: You may continue, Mr. McInerney.

【1931】 By Mr. McInerney:

Q. Mr. Bartels, did you receive this document sometime in or around September 1967? A. Yes. It was subsequent to September 2, 1967.

Q. With respect to this document as well as the two previous documents that you have looked at which have been marked Exhibits 16 and 17 for A & P, how did it come about that you received these documents? A. Document 18-A was Borden's proposal to service stores in the Metropolitan St. Louis area with private label milk. The proposal with this letter was forwarded to me with the other proposals that our St. Louis office had received from other dairies.

Q. You mentioned 18-A. Does your answer equally apply to 18-B? A. 18-A and B.

Q. Sir, how did it come about that Mr. Nelson in St. Louis sent this letter to you? Was that part of his responsibility or duties in his capacity as the Unit Buyer in St. Louis? A. Yes, it was.

Q. Was it the customary practice for a Unit Buyer such as Mr. Nelson to send proposals such as that contained in R-A & P Exhibits 16, 17 and 18 to you as Division Director of purchases for the Middle Western Division? A. Yes, he was required to do that for all proposals on the **【1932】** particular area. In other words, they would come in together with his summary of them and his recommendations as to which one he felt was most favorable.

Mr. McInerney: I offer A & P Exhibits 18- A & B in evidence.

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Mr. Schaefer: Objection, Your Honor and I request a brief voir dire.

Judge Hinkes: You may.

Mr. McInerney: Will you withdraw your objection if I make the same limitation with respect to the same document?

Mr. Schaefer: Yes.

Mr. McInerney: This is being offered under Counts 1 and 2.

Judge Hinkes: Do you still wish voir dire, then, Mr. Schaefer?

Mr. Schaefer: If it is only being offered with respect to Counts 1 and 2, I don't believe that will be necessary, Your Honor.

Mr. Mathias: Your Honor, I will have one or two brief questions on voir dire.

Judge Hinkes: Very well.

Voir Dire by Mr. Mathias:

Q. Referring to Respondent A & P Exhibit for identification, 18-A and B, what relationship, if any, does it bear to the [1933] previous two exhibits Respondent A & P Exhibits 16 and 17? A. The only relationship would be that both of them involve proposals to produce and deliver private label milk but the areas, as you will notice, are entirely different.

Q. Did you have any contact with the Borden personnel in connection with this particular transaction? A. No, sir.

Q. Do you have any personal knowledge as to the stores that are covered by the proposal in R- A & P X-18 A & B for identification? A. Yes, they would be the stores in the Metropolitan St. Louis area.

Q. Were you involved in any way in negotiations for this arrangement? A. No, sir.

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Mr. Mathias: No further voir dire, Your Honor.
No objection.

Judge Hinkes: I gather, Mr. Schaefer, you have withdrawn your objection.

Mr. Schaefer: That is correct, Your Honor.

Judge Hinkes: 18-A & B is received and relevant only to Counts 1 and 2.

(Respondent A & P Exhibit 18-A & B was received in evidence as limited to Counts 1 and 2.)

【1934】 By Mr. McInerney:

Q. Looking at R- A & P Exhibits 16 and 17, Mr. Bartels, I believe in response to a question from Mr. Mathias you said that these referred to a quotation by Borden on private label milk. Do you recall that? A. Yes, sir.

Mr. Mathias: Your Honor, I posed no such questions to the witness. I had no voir dire on Respondent's Exhibits 16 and 17.

Mr. McInerney: But in response to a question that you asked, asking him what the relationship was between 16, 17 and 18, I believe the record will show he so stated and he has reaffirmed he so stated so I don't think we need to be detained on that subject.

Judge Hinkes: Very well.

By Mr. McInerney:

Q. Sir, with respect to this private label proposal referred to that was the subject of the letters marked R-A & P -X- 16 and 17, what did you do with those letters? A. These letters, together with the price schedule as part of the proposal, were forwarded to Mr. Herschel Smith in New York.

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Q. Sir, can you tell us if you recall, did Borden get the business? Was that quote accepted? A. Yes, the one on 16 and 17 was accepted.

Q. What about the proposal to which R- A & P Exhibit 18-A [1935] and 18-B refers, was that accepted? A. We did not accept Borden's proposal referred to in 18-A and B.

Q. Was R- A & P Exhibit 18-A and B forwarded to New York, sir? A. Yes. They would have been forwarded together with the schedule of prices and so forth that Borden had submitted along with those received from other companies quoting on the same business in St. Louis.

Q. Sir, I believe you have told us that prior to the final Borden quotation which you sent to New York, along with your covering letter which has been marked Commission Exhibit 263-A, there was a previous Borden quotation that came to you in several segments. Do you recall that? A. Yes, sir.

Q. Do you recall what the approximate projected savings to A & P on that previous Borden quotation were, if my question is clear? If it is not clear, I will try to rephrase it. A. By previous Borden quotation, you are referring to the one that I said consisted of three parts?

Q. Yes, sir. A. As I remember it, it was in the neighborhood of \$400,000 a year were we to go 100 percent to private label.

Q. Sir, did you discuss that prior quotation, if you understand my question, with Elmer Schmidt? [1936] A. The prior quotation, you are referring to the \$400,000?

Q. Yes. A. Yes, I did.

Q. What did you conclude with respect to this \$400,000 quotation? A. My discussion with Elmer Schmidt was to the effect that I didn't feel that it would be economically sound for us to go to private label on the basis of those figures.

Q. Why was that? A. I made a rough calculation that

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that amounted to, I think, somewhere between four or five dollars per store per day on a six-day-a-week basis and that for us to absorb the labor of moving the milk from the delivery point into the cooler, from the cooler to the case, rotating the milk in the case, absorbing the loss on outdated milk and whatever might be involved in the advertising and promotion of our own label, it didn't appear to me it would be worth our while to make the change.

Q. Sir, did anyone from Borden discuss with anyone from A & P in your presence what A & P's out-of-store price on private label milk and dairy products would be?

A. No, sir.

Q. Where is A & P's Legal Department, Mr. Bartels?

A. The only one I know of is in New York City.

* * * * *

【1957】 * * * But looking over the year 1965, you have testified that you received a final proposal from Borden and prior to that time, you received what was at least another proposal, it was in installments. A. Three installments, that is correct.

Q. There were at least two proposals, the initial one and the final one. What I am asking you is whether it is not true that during your consideration of the various offers which were forwarded to you by Mr. Schmidt from the Borden Company, the question of the legality of the price differential between private label and Borden label products came into your discussions with Mr. Schmidt? A. It did in the case of the final proposal. It was not accompanied by the letter that we had discussions about earlier this morning. That is about as well as I can identify it without looking it up here and only because the letter was not attached to the proposals and we made the decision that we were interested in the Borden proposal, then Borden was asked to provide such a letter.

Q. At that time, you indicated to Mr. Schmidt that you

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wanted assurances from Borden that they could justify these prices as being legal prices, is that correct? A. No, I think I went further than that.

* * * *

【1965】 (The pages referred to were marked Respondent Borden Exhibit RBX-6A and RBX-6B for identification, and was received in evidence.)

Mr. McInerney: If you are not going to go any further—

Mr. Schaefer: No, I am not.

Mr. McInerney: Then I will not restate my objection.

By Mr. Schaefer:

Q. Mr. Bartels, you testified this morning that the final Borden proposal and the Bowman proposal were transmitted to Herschel Smith in New York. My question is how the transmission was made, was the proposal taken to him personally by you or anybody else, or was it mailed to him? A. It was mailed to him.

Q. Mr. Bartels, you testified this morning that both before and after October 1, 1965 you had received letters from Borden containing language like or language of the sort contained in Commission Exhibit 263H, which is the letter from Mr. Tarr that I believe you have in the exhibits before you. Can you tell us, Mr. Bartels, on what specific occasions prior to October 1, 1965 you had received such letters from Borden. A. No, I can not tell you specific occasions.

Q. Can you tell us of any occasion? A. Not specific. By specific do you mean dates?

* * * * *

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【1973】 * * *

Q. Now, would you explain why you see no need for any change? A. I look at it this way: My understanding of the question that Mr. Schaefer asked me regarding discussions of legality, regarding the proposals, was that the pertained to discussions prior to the receipt of the last Borden bid. I recall that I previously testified that when we received that last Borden bid without the letter of assuring us of legal prices and availability I instructed Mr. Schmidt to secure such assurances, which was evidenced by the letter that we discussed earlier today.

Q. And you testified to that previously today, did you not? A. I believe it was today.

Q. Did you also testify with respect to the assurances of availability on this prior occasion in the testimony that I have just shown you? A. Yes, sir.

Mr. McInerney: Your Honor, I would not normally offer this as an exhibit because I don't think that it is necessary, but since Your Honor has accepted the incomplete testimony I would now like to offer this as an exhibit.

Judge Hinkes: Very well. Is there objection?

Mr. Mathias: I have no objection.

Judge Hinkes: Mr. Schaefer?

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【1977】 * * *

Mr. McInerney: I think this is an argument rather than a question.

Mr. Schaefer: I am asking the witness whether in fact that is correct. Is it correct that you had only this one discussion with Mr. Schmidt about the assurances you wanted from Borden?

The Witness: I believe I testified earlier today that subsequent to the letter, subsequent to the time that we received final quotation from Border and

Testimony of Ira Bartels

subsequent to our decision to recommend Borden as a supplier, I instructed Mr. Schmidt to secure the letter of availability and legality from Borden.

By Mr. Schaefer:

Q. Yes, and my question is to your knowledge was this the only time this came up, this one instance, that the question of your wanting assurances from Borden came up in your discussions with Mr. Schmidt. This is what you reflected in your earlier testimony. I wanted to make sure that your comment on re-cross examination was not intended to modify that.

Mr. McInerney: I object to that as a question, Your Honor. I think that is a highly argumentative statement. 1978 I think the witness' testimony, however, is quite clear on the subject.

Judge Hinkes: I think we should make it a little easier for the witness to know exactly what you are speaking of.

Let me get the chronology correct. At one particular time, Mr. Bartels, Mr. Schmidt submitted a Borden bid to you and you noted that it did not contain a letter from Borden concerning the legality of the price and you asked Mr. Schmidt to get a letter.

The Witness: That is correct.

Judge Hinkes: What did you ask him to get, specifically?

The Witness: I asked him specifically to get a letter indicating that the prices were available to others on a proportionately equal basis, that the prices quoted were not below cost and that they were legal in all other respects.

Judge Hinkes: And the transmittal of October 1, I think it is—

The Witness: Yes, sir.

Testimony of Ira Bartels

Judge Hinkes: —was in response to your request to Mr. Schmidt, is that correct, 263-H?

The Witness: That was Borden's response to Mr. Schmidt's request.

Judge Hinkes: And also in response to your request to Mr. Schmidt?

【1979】 The Witness: To Mr. Schmidt.

Mr. Schaefer: My question, Your Honor, is to clarify and make certain that there were not any other discussions with Mr. Schmidt about this letter. That was the ambiguity.

Judge Hinkes: Was that the only discussion you had then with Mr. Schmidt, that discussion in which you told Mr. Schmidt to go back and get a letter of availability or some such letter from Borden?

The Witness: Prior to receiving the letter or subsequent to?

By Mr. Schaefer:

Q. Prior to receiving the letter. A. This was the only discussion.

Mr. Schaefer: No further questions.

Judge Hinkes: Is there anything else, gentlemen?

Mr. McInerney: No, sir.

Mr. Mathias: No further questions.

Judge Hinkes: There is only one thing that disturbs me, and I don't know how pertinent this inquiry is in any event, but I am a little surprised by the Bowman bid which was identical for both private label and for Bowman label in view of your testimony that the private label meant additional cost to A&P and lower cost to the supplier. Can you explain the identical pricing under those circumstances?

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Testimony of John White

July 12, 1973, March 13, 1974

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【1991】 * * *

Judge Hinkes: The President of which division?

The Witness: Of the Middle Western Division.

It was the Middle Western Division at that time.

Judge Hinkes: You mean that Mr. Pierce and Mr. Lewis then reported to the President of the Middle Western Division from their positions in the unit?

The Witness: Right.

By Mr. Stone:

Q. When you became Sales Director of the Chicago Division, did you have any responsibility to make any kind or report to the New York office? A. No, sir.

Q. Now, Mr. White, how many people were under your authority during your tenure as Sales Manager of the Chicago unit approximately? A. About 18 or 20.

Q. And what were their functions? A. I had clerical girls in my department, I had sales representatives who worked with the field, I had an advertising department, I had a price desk department. I think that would just about cover it.

Q. And in connection with the function which you mentioned of setting prices, pricing the products, were you responsible for the setting of the general prices of all the products A&P sold in the Chicago unit? 【1992】 A. Yes, I was.

Q. And did the store manager of the Chicago unit have the authority to unilaterally set prices? A. No, sir.

Q. So tell me how you went about setting prices during this period in a general way.

Testimony of John White

Mr. Curnin: Are we talking about all products that are sold out of A&P stores in the Chicago unit?

Mr. Stone: Yes.

Mr. Curnin: Is this relevant, Your Honor?

Judge Hinkes: Well are you objecting on the grounds of relevancy?

Mr. Curnin: I am objecting on the grounds of relevancy. My understanding is that A&P sells maybe 8,000 items. We will be here for a long time if we have to discuss this as to each of these items.

Mr. Stone: Your Honor, I asked him about his procedure in setting prices.

Judge Hinkes: For all items?

Mr. Stone: For items in a general way.

Judge Hinkes: Is there any need for that?

Mr. Stone: I think there is a need to establish the general procedure utilized by the Atlantic and Pacific Tea Company in setting prices for the Chicago area.

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【1996】 *By Mr. Stone:*

Q. Now, did your office in all cases set prices in the Chicago unit? A. Yes, sir.

Q. Mr. White, I hand you Commission Exhibit 256-A through Z-28, which appears to be a document entitled the Great Atlantic and Pacific Tea Company and at the left hand corner "price list" the typed word "Chicago" and the printed word "unit".

Can you identify these documents, Mr. White? A. Well, I could not positively identify them. I would say they look like they might be our price pages, yes. It looks like the format that we used at that time. I did not handle the price pages personally nor did I assemble this information to be submitted so I couldn't positively identify them but I would say they look like they are ours.

Testimony of John White

Q. Were these documents assembled under your direction or the direction of your office? A. Under the direction of our office but not under my direction.

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【2058】 Q. Did you participate in any fashion in the negotiations between the A&P and Borden which led up to the arrangement which brought about the introduction of private label milk in A&P stores in the Chicago unit? A. I did not.

Q. Did Elmer Schmidt or Ira Bartels at any time discuss or suggest to you what retail should be set on private label milk? A. No, sir.

Q. Did either Mr. Schmidt or Mr. Bartels have any authority at all to enforce any suggestion with respect to the retail price of milk or other products sold in A&P stores in the Chicago unit? A. Would you please repeat that question?

Mr. Curnin: Would the reporter read the question.

(Question read)

The Witness: Neither did because the responsibility for establishing retails rested with me as sales manager.

By Mr. Curnin:

Q. Was that a result of a directive at the unit level or was it a matter of company policy? A. It is a matter of company policy.

Q. And would you explain just what is the company's policy in regard to the responsibility of the sales manager for fixing retails on products sold out of A&P Stores? A. It is the sales manager's responsibility to establish all 【2059】 retails for all merchandise sold. Although he might

Testimony of John White

not do all of this himself, he is responsible for the final approval.

I might add in the case of milk I set the retails on milk myself.

Q. Did you set the retail at which A&P's private label milk and dairy products would be sold out of A&P stores in the Chicago unit during the period 1965 through 1968?

A. Yes, I did.

Q. What factors did you consider in establishing the retail and I ask you now to address yourself to the initial introduction of private label milk and dairy products. A. Mr. Curnin, are you asking me the basis for pricing as I did?

Q. Yes, sir. A. I priced the milk and the by-products at the same retails that we currently were selling the Borden brand for.

Q. And would you tell us your reasons for doing so? A. There had been a precedent set whereby a competitor introduced a private label milk at a lower price than the advertised brand which he carried which resulted in the market meeting that lower price. Later the competitor raised that retail back to the advertised price. I felt the precedent had been set that if I set a retail lower than the advertised brand it would be followed down in the market.

Q. Can you identify for us the retailer that you have reference [2060] to and what point of time this occurred. A. The retailer was Jewel Tea Company and the time was in the mid-50s.

Q. What was the name of the private label milk product that they introduced at that time? A. The item that they introduced at that time was called Yummy.

Q. What are the benefits of private label milk and dairy products as you see them, Mr. White? A. There are several benefits. No. 1, the opportunity is there to increase

Testimony of John White

your gross profit, providing the item sells; second, it gives you an item that only can be brought in your store and I believe third would be perhaps the flexibility that the buyers have in negotiating for milk.

Q. At the time private label milk and dairy products were introduced in A&P stores in November of 1965, did A&P continue to carry Borden brand milk and milk products? A. Yes, we did.

Q. And was it your decision to continue selling both the Borden brand of milk and dairy products and A&P's private brand? A. Yes, it was my decision.

Q. Did you make a determination at that time as to what the division would be in the dairy case, how much A&P milk and dairy products would be carried and how much of the Borden [2061] brand milk and dairy products would be carried? A. Yes, I did.

Q. What was your decision at that time? A. Well, to play it safe we decided we would display on a 50-50 basis, 50 percent for the private label and 50 percent for Borden.

Q. What were your reasons for fixing that as the ratio 50-50? A. It gave me the flexibility if the private label sold—well I could expand the display space if it didn't sell as well as we had anticipated we could reduce the space or completely eliminate it.

Q. And did there come a point in time thereafter when that ratio was changed between the Borden label milk and dairy products and the A&P milk and dairy products? A. Yes.

Q. Can you tell me approximately when that was? A. It would have been somewhere in six months to a year later.

Q. Whose decision was it to change the ratio? A. It was my decision.

Q. Now, can you tell us what that decision was and how you arrived at it? A. The decision was that we would

Testimony of John White

expand our own and reduce the Borden label because the acceptance that we had for our private label was very good.

Q. In setting the retail on A&P's private label milk and [2062] dairy products in Chicago did you receive any suggestions or instructions from A&P in New York? A. No, sir.

Q. Did you have any discussions with Mr. Herschel Smith as to what the retail should be on A&P's private label milk and dairy products prior to your setting the retail? A. I never discussed retails with Mr. Smith.

Q. During the period 1965 and continuously thereafter through 1969 did the A&P Tea Company have a policy regarding discussing retail prices with supplier? A. Yes, we did.

Q. What was that policy? A. Our policy was not to discuss retails with suppliers.

Q. During the same period of time starting in 1965 and continuing through continuously through 1968, did anyone from Borden Company ever discuss with you or suggest to you the retail that should be set on milk sold in A&P stores in the Chicago unit? A. No, sir.

Q. Did you ever discuss the retail prices, actual or proposed, on milk and dairy products with anyone from the Borden Company? A. No, sir.

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[2071] * * *

Q. Mr. White, I show you Commission's Exhibits in evidence 91 and 92 and I ask you if you have ever seen these documents prior to this morning. A. I have never seen the documents prior to this morning.

Q. One last question, Mr. White.

To your knowledge did the Executive Committee of the Chicago Unit participate in any way in negotiations for private label milk and dairy products between A&P and Borden? A. No, they did not.

Testimony of John White

Q. Did the executive committee participate in any way in your decision as to the price that would be charged for private label milk and dairy products? A. No, they did not.

Mr. Curnin: No further questions.

Judge Hinkes: Mr. Schaefer.

Mr. Schaefer: No questions, Your Honor.

Judge Hinkes: Any redirect?

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【2097】 * * *

As of this moment, I think that further authentication might be a preferable move on your part. In any event, I shall reserve my ruling on your motion.

Mr. Stone: Thank you, Your Honor.

We have no further questions.

Judge Hinkes: Is there anything else?

Mr. Curnin: Just a moment, if I may, Your Honor.

Just one question, Mr. White.

Recross-Examination by Mr. Curnin:

Q. Did the A&P stores within the Chicago unit located in Iowa, did they receive private label milk and dairy products? A. No, they did not.

Mr. Curnin: No further questions.

Judge Hinkes: Thank you.

You may step down.

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【5897】 * * *

Mr. Curnin: I note, Your Honor, Mr. White has previously been a witness in this case, called during complaint counsel's case, and that his prior testimony appears on pages 1983 through 2097.

Testimony of John White

Judge Hinkes: Thank you, in which case there is no need for a swearing, again. You may be seated. Let me just remind you you are still under oath.

The Witness: Yes, sir.

By Mr. Curnin:

Q. Mr. White, you have already testified as to your background and position, but to put it in context, would you tell us by whom you were employed during the period 1965 through 1968, and in what capacity? A. 1965 to 1968, I was employed by the Great Atlantic & Pacific Tea Company, and I was the Sales Manager of the [5898] Chicago unit.

Q. And as Sales Manager for the Chicago unit, did you have some responsibility for establishing retail prices out of A&P stores? A. Yes, I did.

Q. During the period 1965 through 1968, did all of the A&P stores in the Chicago unit sell milk at the same retail or out of store price? A. No, they did not.

Q. And there were therefore occasions on which some of the stores had different retails? A. Yes, there were.

Q. What was the reason for that? A. If a Manager called and got permission to meet a retail of a major competitor, 5 or more stores, and that permission was granted, then he sold milk at a different price than the regular retail set for it.

Q. When you say permission was granted, was that permission granted by you or your office? A. Indeed it was.

Q. During the period 1965-1968, on a weekly basis, how many retail stores in the Chicago unit would be selling milk at a lower retail out of store price? A. 20 to 30 a week.

Judge Hinkes: That is 20 to 30 out of how many?

[5899] The Witness: Out of the 175 stores in the Greater Chicago area.

Testimony of John White

By Mr. Curnin:

Q. Again, during the same period of time, Mr. White, what would the price reduction have been on the gallon package that would have been authorized by your office?

Mr. Mathias: I would object to the generalness of that question—what particular instance is he talking about?

Judge Hinkes: I presume this was not a constant situation, Mr. Curnin, and you would have to specify the time or the instance to which you are referring.

By Mr. Curnin:

Q. Lets take 1966, and we will break it down into quarters or half year periods, I think would be one approach to this.

Mr. White, in 1966, in the first half of 1966, can you recall the price reductions which you authorized on gallon packages during that time period to meet the competitive situations about which you have told us?

Mr. Mathias: Your Honor, I would still object. It has not been shown, I mean, this was a uniform thing throughout each of these stores, where a reduction was made. I believe some foundation must be laid here.

Judge Hinkes: He is not being asked for that foundation, as I see it. He is being asked to recall, if **【5900】** he can. We will go into more specifics after we find out whether he can recall.

The Witness: I think, in answering that question, I would have to say that it would range probably from 4 cents a gallon to 10 cents a gallon.

Testimony of John White

By Mr. Curnin:

Q. And the price reduction authorized on the half gallon package, what would that have been, Mr. White? A. Of course, that was less. It would probably run from 2 cents to 6 cents.

Q. During the balance of 1966, July through December, what would the price reduction have been that you authorized in these stores? A. I would say it would be about the same.

Q. In other words, it would be in the same price range you have given for the gallon and the half gallon? A. Yes.

Q. In the year 1967, can you tell us what price range reductions you authorized? A. I really think it would be about the same.

Q. What about 1968? A. The same.

Q. When you authorized reduced retails in these 20 to 30 stores during this time period, did you receive from your milk supplier a reduction in the into store or wholesale **【5901】** price that was being charged to A&P? A. Yes, we did.

Mr. Mathias: Your Honor, I would object to that question and ask the answer be stricken unless some foundation can be shown to indicate whether the witness knows whether or not he received a reduction in the wholesale price. There has been no showing Mr. White has any connection with the wholesale price, at this point.

Judge Hinkes: It seems to me that is proper. We will strike the answer of the witness, but you may pursue it further, Mr. Curnin.

By Mr. Curnin:

Q. If you know, during the period 1965 to 1968, what price A&P was paying its milk supplier for milk? A. Yes, I knew the price, the cost of the milk, at the time, yes.

Testimony of John White

Q. Who was A&P's supplier during this time period?
A. Borden.

Q. When you authorized a price reduction to meet a competitive situation in those instances, did you receive any price reduction from Borden Company? A. Yes, we did. We received a price reduction.

Q. And in what amount? A. The amount of the difference from our regular retail to the special retail to meet the competitor.

【5902】 Q. Let me see if I can give you an example, Mr. White. If you, for example, reduced the gallon price by 4 cents, in other words, you lowered your retail by 4 cents, in what amount would the Borden Company have lowered its into store price to you? A. 4 cents.

Q. What was the dollar amount of the average weekly price reduction that you received from the Borden Company in 1965, and prior to November 1, 1965, when you had to reduce your retails because of the competitive conditions?

Mr. Mathias: Your Honor, I would object unless there is some foundation for his knowledge here. We have had some very rough estimates here of price reductions, and it seems to me—

Mr. Curnin: I will ask that question, Your Honor.

Judge Hinkes: Very well.

By Mr. Curnin:

Q. In 1965, prior to November 1, 1965, did you know of the approximate dollar amount of the reduction which A&P received in its into store or wholesale price from Borden because of the competitive conditions that you had to meet in the Chicago unit? A. At that time, I was well aware of that, yes, sir.

Q. And what was the amount of that reduction on a

Testimony of John White

weekly basis? **【5903】** A. To the best of my recollection, I would estimate about \$2700 a week.

Q. Can you recall for us the date on which A&P switched from selling all Borden label milk and dairy products in its stores to private label products and Borden products?

A. Around the 1st of November 1965.

Q. After November of 1965, when you had to meet these competitive conditions that you told us about, did you continue to receive a reduction in the into store or wholesale price from Borden on those occasions?

Mr. Mathias: Your Honor, I am going to object to the record at the present time as being to the effect that from 1965 to 1968, that A&P received price reductions to meet competition, and that the approximate dollar—weekly dollar value of these price reductions was \$2700 a week. Your Honor—excuse me—I have been corrected. As to the weekly dollar value of this price reduction that was limited to 1965, but the prior testimony elicited, as to the fact of the price reduction applied to 1965 to 1968.

Now, it would appear that Mr. Curnin is going to impeach, in some way, this prior testimony by Mr. White.

Judge Hinkes: I don't know if we can anticipate that. The question that is pending is simply whether or not this witness knows of the price reductions that were in effect, if any, after November 1965. I think that question **【5904】** can be answered. We will go on from there. Do you want to have the question repeated?

The Witness: If you would, please, Your Honor.

(The pending question was read by the reporter).

The Witness: No, we did not.

Testimony of John White

By Mr. Curnin:

Q. Why was that, Mr. White? A. That was a part of the agreement in the purchasing of the milk, that we would not receive it.

Q. Was that the agreement to purchase private label milk? A. Yes.

Q. One of the conditions was you would no longer receive a reduction in the into store price from Borden when you, A&P, reduced your retail prices to meet competitive prices? A. That is right. We were not going to receive any further allowances from Borden to meet competitive situations, and that was clearly understood between my Buyer and me.

Q. Prior to November 1, 1965, those weekly reductions amounted to approximately \$2700 a week? A. Yes, sir. That is my best testimony.

Judge Hinkes: Mr. White, was your failure to receive any price reductions from Borden after November 1965, applicable to private label only or to private label and Borden label, or just to what?

【5905】 The Witness: Private label only.

By Mr. Curnin:

Q. Following up Your Honor's question, and according to the agreement, the agreement was you continued to receive a reduction on the into store price on Borden label products when you lowered your out of store price to be competitive? A. Yes, we did.

Q. The loss was only in connection with the private label? A. Yes, that is right.

Q. During the period 1965 to 1968, Mr. White, were you aware of the ratio of expense to total sales in the Chicago unit as compared with other units of A&P? A. Yes, I was.

Testimony of John White

Q. And how did the ratio of expense to total sales in Chicago compare with these other units?

Mr. Mathias: I am going to object on 2 grounds. First of all, this is quite obviously getting beyond milk, plus it goes beyond the statement of the intended testimony to be taken from Mr. White. I will read, as follows—make sure I read completely the proposed testimony from Mr. White, as identified in A&P's witness list, supplemental proposed witness list filed February 11, 1974.

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Testimony of Richard L. Kristoff

July 16-17, 1973

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【2270】 A. We'd send out an employee with a list to check the different supermarkets in the area for the items that we were interested in.

Q. And did these items usually include milk and dairy products, sir? A. Yes.

Q. And why did you compare your prices, sir? A. We wanted to be competitive.

Q. During this time period, can you recall the A & P stores in Hammond ever leading off on a price reduction on milk? A. No.

Q. In your opinion, based on your experience, did your Hammond store compete with the A & P stores in the Hammond—in the Hammond area? A. Yes, I would say so.

Q. And what is the basis for your opinion, sir? A. I would say by customer comments to us, and just being in the geographic area, people are—would shop in our store or their stores.

Q. Were your stores in the—was your store in Hammond and the stores of A & P of comparable size? A. No.

Q. Which would be bigger? A. Ours were bigger.

【2271】 Q. Were the A & P stores of super market size?

Mr. Curnin: Objection, your Honor.

Judge Hinkes: What ground?

Mr. Curnin: On the grounds I think the question is unclear. What is super market size?

Judge Hinkes: Well, we'll see if the witness can answer that and what his understanding of it—

The Witness: What was the question again?

By Mr. Mathias:

Q. I asked if the A & P stores were of supermarket size. A. I would say they were, yes.

Testimony of Richard L. Kristoff

Q. What would you understand by "supermarket size"? What size would that connote to you, sir? A. I would say a store size of in excess of 6—6,000 square feet on up.

Q. Now, sir, did the A & P stores have parking facilities in connection with each of them? A. Yes.

Q. And did the A & P stores carry comparable stock to that carried in your store? A. Yes.

Q. Now, sir, in the conduct of your business, how important is purchase price to your company with relation to your ability to compete?

【2272】 Mr. Curnin: Objection, your Honor, unless limited to dairy products.

Judge Hinkes: Would there be any reason for departing from the specific area of dairy products?

Mr. Mathias: Yes, your Honor. I believe that it is important to peruse at least superficially the area of competition on the broad retail grocery line. This has been an area of concern by the Commission and the courts in prior cases of like and almost identical import, and we do not intend to go into those with any great degree of depth, but I do believe that it's important to explore the nature of competition in the retail grocery industry. This is the basis on which these people competed.

【2273】 Judge Hinkes: I will allow it to a limited extent, but I do think, though, we ought to get into the specifics as quickly as possible.

Mr. Mathias: Your Honor, most of my questions will be directed as specifically as possible in milk and dairy products.

Do you recall the question now, Mr. Kristoff, or would you like it read by the Reporter?

The Witness: Would you read it back, please.

(Question read.)

Testimony of Richard L. Kristoff

The Witness: I—I would say that the purchase price will affect your gross profit and your net profit, and thereby offer you a profit margin comfortable to compete and do whatever you wish to the gross—or the profits.

By Mr. Mathias:

Q. Does it also affect your retail price on a product? A. Definitely.

Q. Do you consider discounts or rebates of one or two percent on a product to be important? A. Yes, sir.

Q. And why is that, sir? A. Well, again I would say it affects your gross profit, and ultimately your net profit.

Q. Are discounts and rebates on milk and dairy products important to your operation? **[2274]** A. Yes.

Q. And why is that, sir? A. Because it represents a measure, or a part of our total sales.

Q. Milk and dairy products are a substantial part of our total sales? A. Yes—not substantial, but a part of it, I would say in the vicinity of four or five percent.

Q. And just how important is milk to your operations? A. Well, it's an item that is purchased daily by most families. Everyone drinks milk, and it's a perishable item that cannot stand, or cannot keep too long in the refrigerator at home, so we buy it fresh every day so the customer can't keep it too long, so they are in almost every day for milk, or at least two or three times a week for milk.

Q. And does this draw—when they come in to purchase milk, do they purchase other products? A. Right. They purchase other items, right. It's a full service.

Q. In relation to your other, the other products carried in your store, is milk a high volume item? A. Yes, it is. I would say it's of a single item, yes.

Q. Well, are the consumers generally familiar with the milk prices in the various stores?

Testimony of Richard L. Kristoff

Mr. Curnin: Objection, your Honor.

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【2281】 * * *

Mr. Curnin: What period of time are we talking about, your Honor?

Mr. Mathias: We were talking about 1966 through 1970, but I will make it a little more specific.

During the period of time in this case, from October, 1966, through March of 1967 and June of 1969 through March of 1970,—

The Witness: Other than the—

By Mr. Mathias:

Q. —other than the regular monthly rebate check. A. Yes, some coupons, coupon—we actually took coupons for an item and returned them to the Borden Company, and received payment for those. They were not milk-related, though.

Judge Hinkes: They were not milk-related?

The Witness: No.

They might be dry milk or something. I don't know.

By Mr. Mathias:

Q. Now, in January of 1967, did you receive a second check from the Borden Company in the amount of \$207.61

A. That is right.

Q. And do you know what that was for, sir?

Mr. Curnin: Your Honor, I don't wish to interrupt
【2282】 but the dollar amount and the month somewhat came out of the blue for me. If the Court would permit me, I would like to have that question read back.

Testimony of Richard L. Kristoff

Judge Hinkes: Yes, surely.

(Question and answer read.)

Mr. Curnin: Your Honor, when Mr. Mathias refers to a second check, does that mean in addition to the monthly rebate checks that he has been talking about?

Mr. Mathias: Yes.

Judge Hinkes: Can you explain that?

The Witness: Yes.

I don't know what it's for.

By Mr. Mathias:

Q. In other words, you did receive two checks during that month? A. Yes. Our records indicate that; however, I do not know what it was for.

Q. You do not know what the check in the amount of \$207.63 was for? A. No, I don't.

Q. I show you a page of your ledger sheet—I show you a copy of your ledger sheet which shows an entry of a deposit for January 19 in '67, and there is a marking, "Bordens," and then a small letter "a" and then the amount "\$207.63."

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【2327】 * * *

Q. Well, let me rephrase it.

You testified that you were supplied during this period of time by both Borden and Meadowmoor. A. Right.

Q. How much of your daily business did Borden have during this period of time, and if it changed, would you let me know, sir, in this one store, now— A. Yes.

Q. —in Hammond, and although I don't specifically refer to the Hammond store all the time, that is the store I am concerned about. A. Right.

Q. And all of my questions are directed to the store in Hammond, Indiana. A. Right.

Testimony of Richard L. Kristoff

Q. During this period of time, '65 through '70, what percentage of your milk and dairy business was handled by the Borden Company? A. I would say between 30 and 40.

Q. Did it change at all during this period of time, sir? A. It was—no, I would say it was fairly constant.

【2328】 Q. Did the Borden Company, during this period of time, endeavor to increase their percentage of the products, of their own products sold out of your Hammond store? A. No.

Q. —by offering you special discounts? A. No.

Q. Did you receive offers from Meadowmoor? A. No.

Q. Did they both charge the same into-store price on milk and dairy products? A. Not always. It varied sometimes.

Q. Sometimes Meadowmoor would be lower than Borden — A. Right.

Q. —and vice versa? A. That's true.

Q. During this period of time, again 1965 through 1970, would it be correct to say that Meadowmoor generally was lower on its milk and dairy prices, and that is why it had 70 percent of the business, or 65 percent to 70 percent of the business? A. Yes.

Q. Pleasant View Dairy and the others that you mentioned, were they local brands with local acceptance in the Hammond area? A. Yes.

【2329】 Q. Did they offer you a price on milk and dairy products which was lower than that being charged by the Borden Company, if you can recall, sir? A. I don't think so, no.

Q. Did you receive offers from other dairies, the prices of which were lower than that being charged by Borden? A. I would say they were all pretty close to the same. There was no drastic price cutting of any kind.

Q. But may there have been offers, or did you receive offers during this period of time from dairies offering prices lower than that being charged by Borden, even if it

Testimony of Richard L. Kristoff

was only a slight difference, as you have described it? A. I would say on occasions that there might have been a half a cent, or a cent a gallon.

Q. In your opinion, Mr. Kristoff, was the gallon the most competitively priced milk package during this period, '65 to '70? A. Yes.

Q. And was also more milk sold in that package than any other? A. In single, single item, yes; not dollarwise, but single item, yes.

Q. You may have testified about this earlier this [2330] afternoon, Mr. Kristoff, but it's not clear from my notes: were you billed at list from the Borden Company, or were you billed at a net price? A. A net price.

Q. Were you ever shown, or did you ever see Borden's published discount schedule as applicable in the Hammond area? A. No.

Q. Were you aware during this period of time, 1965 to 1970, that Borden did have a published discount schedule? A. I was not aware of it. I did not see it.

Q. You testified that you were billed at net.

You have also testified, I believe, that in addition to that you received a rebate check—I think is how you described it—from Borden as well. A. Right.

Q. So that if I may use this terminology, the amount of the bill wasn't a net-net billing, it was a billing from which further deductions were going to be made substantially on a monthly basis? A. That's correct.

Q. You testified about rebate checks, and did you receive, in addition to rebate checks, checks for allowances? A. No.

[2331] Q. You testified this morning that there was a check received in January of '67, I believe, for \$207.63, and that is Commission's Exhibit 268, for identification, next to which appears a little "a"; was that an allowance check or— A. Yes, it was an allowance check.

Testimony of Richard L. Kristoff

Q. And it was an allowance received in part—or not in part, it was an allowance received on your milk and dairy purchases from Borden for the prior month? A. That I do not know.

Q. Did you receive this amount of money in check or cash? A. It was a check.

Q. Were you purchasing anything else from the Borden Company?

Judge Hinkes: Anything but—

By Mr. Curnin:

Q. Other than milk and dairy products. A. Oh, yes.

Q. And what, such as? A. Well, we have there Borden's Instant Milk; we have some, a lot of dairy items that are Borden's. There is a Borden's Potato.

You have—Borden's I believe has a, like a Cremora. It's a substitute cream item, dehydrated cream.

【2332】 Q. Did you receive, during this period of time, allowances on those items, sir? A. Not to my knowledge.

Q. So that to the best of your knowledge and belief, this figure here, this amount, the \$207.63 was received from checks with your purchase of milk and dairy products from the Borden Company? A. I have no way of knowing at this time. It could have been.

Mr. Curnin: I am going to show the witness Xerox copies of a document entitled, "Cash receipts, 1966"; if Complaint Counsel has the original, I will show that to the witness.

Mr. Mathias: That is the same as yours. I obtained it from you.

Mr. Curnin: Well, I mean, this document, if there is any question, was produced by Complaint Counsel

Testimony of Richard L. Kristoff

to Counsel for A & P, and Counsel for Bordens, I think within the last seven days; is that not correct?

Mr. Mathias: This, I take it this is the one. You resupplied me with a copy this morning.

Mr. Curnin: Well, I Xeroxed what you supplied me. Is there any question about that?

Mr. Mathias: Well, if that is the case, then it's the same thing.

【2333】 By Mr. Curnin:

Q. I notice this document is entitled, "Cash receipts"? A. That's right.

Q. Would it be proper to assume, then, that it is a reflection of, and a recording of monies received in the form of cash? A. Or—it's or check.

Q. Cash or check? A. Um-hmm. This whole sheet is cash or check.

Q. Going down the first sheet, Mr. Kristoff, and across from November 1, 1966, someone has circled "Bordens, \$443.78"; does that reflect a check you received from Borden? A. Yes, that is.

Q. Or cash which you received from Borden? A. It would be a check.

Q. And that was a further reduction in the charge imposed by them on your purchase of milk and dairy products? A. I have no way of knowing that. It's from the Borden Company, but I don't know if it came from the milk, or where it came from, other than it's marked Borden.

Q. Well, did it come from—and does it constitute a rebate on your purchase of milk and dairy products? A. I would, not knowing actually receiving the check, 【2334】 I would assume it was on milk products. I mean, I don't know. I would assume it's milk products.

Testimony of Richard L. Kristoff

Q. Let me show you this document, Mr. Kristoff, and I ask you, or I direct your attention to the second sentence—
A. Yes.

Q. —and ask you if that refreshes your recollection, if these entries for check or cash payments were not received by you as rebates from the Borden Company on your purchase of milk and dairy products. A. Yes.

Q. And that would be a check received on your purchases in the month of October? A. Right.

Q. Is this in addition to the regular monthly rebate check that you received from the Borden Company? A. I would assume it, yes.

Judge Hinkes: You say you would assume that; are you saying that you know, or you don't know?

The Witness: Well, it's, you know, it's a ledger entry. It says the Borden Company, and it's, you know, the amount is in there, and I would say we have received very few checks other than Borden checks—coupon and other allowances are very limited, so I would assume this came from Borden, from the milk.

* * * * *

【2347】 * * *

Q. And you testified in regard to what's now Page 22D, that that was different from the regular monthly rebate check which you received from the Borden Company. A. Are you referring to that one that was \$207.59 or something?

Q. \$207.63, sir. A. Yes.

Q. Does that mean that all the Borden checks which are entered here with the designation "a" are checks received in addition to the one regular monthly rebate check from the Borden Company?

Testimony of Richard L. Kristoff

Mr. Mathias: Your Honor, I object to the—to the use of the word "addition" here.

The Witness: Yes, that's confusing me.

Mr. Mathias: This—Mr. Curnin is characterizing these entries, and I believe in an unfair manner.

Judge Hinkes: Well, wait a minute. Let's see if we can't straighten this out.

Mr. Kristoff, earlier in your testimony you were asked about an item of \$207.63.

The Witness: Right.

Judge Hinkes: If I understood your testimony, you said that that amount of money was received from Borden's as a rebate on your milk purchases in addition [2348] to the regular monthly rebate that you were getting from Borden. Now, is that correct or is that incorrect?

The Witness: Yes, for that one month, that one particular month, two checks were entered.

Judge Hinkes: All right. Now, that amount, that \$207.00 amount was marked with a letter "a".

Now, the question is, that being the case, that is, \$207 followed by the letter "a", does it mean that every time a rebate amount appears from Borden on that batch of documents, that that amount followed by "a" is also an amount that you received in addition to the regular monthly rebate that you get from Borden? Does the letter "a" mean that in every instance where it appears, just as it happened to mean it in the \$207 item?

The Witness: Right.

Judge Hinkes: It does mean that.

The Witness: (Nodding head.)

Judge Hinkes: That is to say, every time the amount appears followed by the letter "a", an amount that you received from Borden, it is in addi-

Testimony of Richard L. Kristoff

tion to the regular monthly rebate check that you got?

The Witness: Now, I only received one check per month.

Judge Hinkes: That was regularly?

* * * * *

[2364] * * *

He is here, and Complaint Counsel has told us to verify the net prices paid to during what Complaint Counsel considers to be the relevant time period.

I am not going into an issue, your Honor, which is beyond Complaint Counsel's direct.

Mr. Mathias: Your Honor, we have not gone into the net price paid by the witness. We have not produced any invoice for him to connect up these payments with. We have simply gone into one document which was information in addition to that which we had received from the Borden Company.

Mr. Curnin: This witness is here, your Honor, to—

Mr. Mathias: We merely asked,—as a matter of fact, we did not even go into the document. We haven't offered it in evidence. We merely asked if he could tell from his recollection the nature of a payment that may have been received from the Borden Company in the month of January, 1966.

Mr. Curnin: Your Honor, the purpose of this witness' testimony now is to verify Commission's Exhibit 265.

It was on—

Judge Hinkes: To verify it after it has been received?

Mr. Curnin: That's correct, your Honor.

[2365] Judge Hinkes: If it was not verified at the time of receipt, that was your fault. It should have

Testimony of Richard L. Kristoff

been objected to on that basis, and it would have been sustained, but the document was received, because in my opinion it was receivable in evidence.

This witness cannot verify something to my satisfaction after it has been received.

Mr. Curnin: Your Honor, we did object to the receipt of 265, and it's complaint counsel's statement here on the record that this witness' testimony is being elicited to verify 265, because he, himself, has discovered a discrepancy in 265.

Mr. Mathias: No, your Honor, I am not requiring any verification of 265.

Judge Hinkes: No, what he is trying to do is explain an apparent discrepancy in 265 by the entry of two items.

Mr. Curnin: And then the witness' testimony on direct, your Honor, was that he had received two checks in the month of January covering December, and what we are just trying to get at here is just what are the facts.

The Court: I understand that, but I say the time for that is when you present your defense. I will not allow further questioning on this document on matters that have not been brought into the direct examination * * *

【2378】 * * *

Q. Now, during this period of time, were you advised by the Borden Company that at your option you could receive a further discount if you did the pre-ordering? A. No.

Q. Were you advised by the Borden Company during this period '65 through '70 that if you accepted drop shipments, in other words, that the milk and dairy products would just be dropped in your cooler, but there would be no rotation of stock, nor removal of outdated merchandise, that you could receive a further discount? A. No.

Testimony of Richard L. Kristoff

Q. Did you during this period of time receive any in-store promotional allowances from Borden? A. Yes.

Q. On milk and dairy products? A. Right.

Q. And did you also receive from the Borden Company point of sale promotional material? A. No.

Q. Did Borden during the course of the year provide demonstrators in your stores? A. On occasions they did, yes.

Q. And were you visited on a monthly basis by the Borden salesman? 【2379】 A. Yes, I would say so.

Q. Did you receive any—any equipment of any kind from the Borden Company? A. No.

Q. You testified on direct, sir, as I recall, that you received special prices on dairy products which would run for a week duration, and that they amounted to five cents or ten cents off the regular price. A. That is right.

Q. And did you receive these special prices on dairy products during the period 1965 through 1970? A. Yes.

Q. The use of specials by the Borden Company, was that a fairly frequent occurrence during this period 1965 through 1970? A. No, I would say approximately maybe one a month or one every two months.

Q. But it would run for at least— A. A week.

Q. —a week. A. Um-hmm.

Q. And would that special or the promotion which was provided by Borden build traffic in your store? A. We'd reduce the price of the item and pass the savings on to the customer.

【2380】 Q. And the special price was promoted? A. And it was—we would sell more of the item than we sold before on normal price.

Q. And these specials were promoted by you through window displays? A. No.

Q. Window signs? A. Just in the store. A sign was hung over the item.

Q. Point of sale advertising sign? A. Yes.

Testimony of Richard L. Kristoff

Q. Was it ever promoted or advertised by you in the local paper? A. No.

Q. Did you participate during this period of time in any co-op advertising with the Borden Company? A. No.

Q. Was there any advertising allowance at all received from the Borden Company? A. No.

Mr. Curnin: Your Honor, I've concluded this line of questioning with the witness. I have several other areas to cover, and I will not be able to conclude them by 4:00 o'clock this afternoon. Considering the hour that it is, and in accordance with your Honor's wishes, this might be an appropriate time to adjourn for

【2381】 Mr. Mathias: Your Honor, I'd like for Mr. Curnin to go as far as he can, even if he has to cut off in the middle of a line of questioning. We do have other witnesses scheduled for tomorrow, three others, and I would like to—

Mr. Curnin: I'll go forward, your Honor, if complaint counsel wishes.

Judge Hinkes: Well, I think you should go forward at least for another 20 minutes, but I don't think we want to run past 4:15, in any event.

By Mr. Curnin:

Q. Will you describe for us, Mr. Kristoff, the approximate number of square feet of your Hammond store? A. Oh, about 55,000.

Q. And during what hours was your store open during the period 1965 to 1970? A. 9:00 a.m. to 10:00 p.m.

Q. And would that have been six days a week, sir? A. Right. Closed on Sunday.

Q. You have identified for us certain corporate chains which were in operation in the Hammond area during this period of time.

Testimony of Richard L. Kristoff

Are you able to break them down between primary competitors and secondary or less significant competitors [2382] for us? And if that question is not clear, then I'll rephrase it.

I'll withdraw the question, Mr. Kristoff.

You mentioned Jewel. Was Jewel your principal competitor in Hammond?

Mr. Mathias: Your Honor, I'm going to object to the characterization of "principal" here. This—I don't know whether a proper foundation has been laid for that.

Mr. Curnin: Well, certainly this witness is familiar with his competitors, and I would assume that he is also aware of major competitors and minor competitors, and I think he's certainly qualified to testify.

Judge Hinkes: I think the witness can answer that question.

What is your answer, Mr. Kristoff?

The Witness: You asked if Jewel Tea was a—

By Mr. Curnin:

Q. Jewel. A. —was a major competitor?

Q. Was Jewel your major competitor? A. Are you talking about 1965 through '70?

Q. 1965 through '70, not before, not after, in that time period. [2383] A. I would say Jewel would be a—one of the major competitors.

Q. And National Tea? A. Yes, I would say so.

Q. And the Kroger Company? A. Not as strong, but a competitor.

Q. Now, you mentioned that the A&P store in Hammond was a competitor. By that, sir, did you mean that the A&P

Testimony of Richard L. Kristoff

store and your store in Hammond drew customers from the same general area?

Mr. Mathias: I'm going to object to that question, your Honor, because he's mischaracterized the witness' testimony. The witness testified that he competed with three stores in Hammond, and Mr. Curnin has characterized that testimony as being one store.

Judge Hinkes: He didn't.

By Mr. Curnin:

Q. You had reference, Mr. Kristoff, to three A&P stores in Hammond.

Can you tell me where those three stores were located?
A. There was one on Homan Avenue, there was one on—there is a store on Sohl—I don't know the exact address of the one on Sohl, and there's one on 165th Street in Hessville.

【2384】 Q. When you say 166th (sic) Street in Hessville, is that outside Hammond or— A. It's in Hessville. It's a suburb. It's in the City of Hammond, but it's called the Hessville section. It's near Kennedy Avenue, which is a north-south street.

Q. Was A&P's competition with your store on the same magnitude as Jewel and First National (sic)? A. No.

Judge Hinkes: First National?

Mr. Curnin: Excuse me, your Honor. National Tea, your Honor.

The Witness: National Tea.

Mr. Curnin: I'm referring to a local supermarket. I stand corrected.

By Mr. Curnin:

Q. You testified that you competed with these three A&P stores.

Testimony of Richard L. Kristoff

By that did you mean, sir, that your store and these A&P stores drew customers from the same general area? A. Yes.

Q. Isn't it a fact, Mr. Kristoff, that none of the A&P stores was as significant a competitor as Burger during this period of time? A. I would say so, yes.

【2385】 Q. And isn't it true that the three A & P stores that you're talking about were much smaller in size and were not maintained or spruced up to the extent that your store was in Hammond during this period of time? A. Yes.

Q. And isn't it also true that some of these A & P stores have since closed down? A. Yes, one closed on Homan Avenue.

Q. Do you have any records, Mr. Kristoff, of the retail prices that were charged in your Hammond store for milk and dairy products during the period 1965 to 1970? A. No.

* * * * *

【2416】 A. I don't quite understand your question. The income tax returns are prepared by our accountant from our financial statements to establish our obligation for taxes.

Q. And in establishing your obligations for your tax payments, isn't one of the purposes to maximize the expenses of the corporation so as to minimize, within the law, the profit that the corporation will have to pay a tax on? A. Well, I would assume that they were prepared in an accountant manner that's acceptable by the government. I don't know if his end results or criteria of preparing the statement is that. I've never questioned him.

Q. To your knowledge, did A & P's introduction and sale of private label milk and dairy products during the period 1965 through 1970 injure the business of Burger's Super Markets? A. No.

Testimony of Richard L. Kristoff

Mr. Curnin: Your Honor, I ask at this time if there is any interview report of this witness, that it be made available to us.

Mr. Mathias: Your Honor, the only—we—the only interview report that I am aware of may not have been turned over to Respondents was a statement that—not a statement—rather—but an interview
• • *

【2433】 • • *

By Mr. Mathias:

Q. Now, during the period 1966 to 1970, how often were demonstrators supplied to your store, sir? A. I would say maybe three or four.

Q. Three or four times? A. Yes.

Q. Now, sir, in response to questioning from Mr. Curnin this morning, he asked a series of questions concerning dairies' offers of loans and equipment.

Were you offered loans and equipment by dairies during this period, 1966 to 1970? A. No.

Mr. Mathias: Your Honor, could we have just a few brief moments recess, and I think that I am completed, but there are some notes from yesterday that I would like to quickly review.

Judge Hinkes: Very well.

(Short recess.)

Mr. Mathias: Your Honor, we have no further redirect.

Mr. Curnin: No recross, your Honor; * * *

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Testimony of Glenn W. Gintert

July 17, 1973

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【2456】 * * *

Q. Now, leaving that for a moment, Mr. Gintert, how important is milk to your operation? A. It's a very important item. It's an every-day item.

Q. Are discounts and rebates on milk and dairy products important to your operation? A. Yes, sir.

Q. And why is that so, sir? A. Because it's an item the housewife buys every day.

If you are competitive on milk and dairy products, you have a good chance of keeping your customers.

Q. What is the—is milk a—how does milk move in your store? A. Very good. It's a—

Q. Is it a high volume— A. It's a high volume item.

Q. Do consumers come in periodically to get milk frequently? A. Oh, yes. It's usually one of the items they come in and shop for, milk and bread, that is an every-day item.

* * * * *

【2464】 (Discussion off the record.)

(Question read.)

Mr. Dembrow: Thank you.

The Witness: I don't know how they were calculated.

All I know is we got a check from Borden. I wasn't involved in the—

By Mr. Soeffing:

Q. You don't know whether they were paid on a percentage basis? A. No, sir.

Q. How many checks did you get a month? A. I believe it was two, two or three.

Testimony of Glenn W. Gintert

Q. Would these be—would these all be rebates? A. Well, one was a rebate; one was an interest check, and the other one was, I think, a rebate on ice cream.

Q. So there were separate rebates for milk and ice cream? A. Yes, sir.

I don't—some part of the time we didn't get rebates on ice cream, but some time we did.

Q. I understand. A. I am not familiar with the date on those.

Q. The ice cream rebate check that you mentioned, would that have come toward the end of the 1966 through [2465] 1970 period? A. The latter part, yes.

Q. 1969, 1970? A. '70, in there.

Q. And the ice cream rebate check, was that a smaller check or a larger check than the milk rebate check? A. Small.

Q. Smaller? A. Yes, sir.

Q. Mr. Gintert, did you ever receive any loans of equipment or any free equipment from Borden Company? A. Yes, sir.

Q. What kind of equipment was this? A. Coolers, display coolers.

Q. How many? A. One, two; it varied.

Q. Did Borden retain title to these? A. Yes, sir.

Q. You only have the use of the coolers? A. Yes, sir.

Q. How much would you estimate the value of these coolers or cooler, at the time you received it, or them? A. Oh, probably \$500.

Q. Do you remember approximately the time you first [2466] received the cooler? A. No, sir.

Q. Was it prior to 1966? A. I—I don't, can't remember. I know periodically they have always, you know, but—

Q. Was it recently or was it some time before that?

Mr. Schaefer: Objection, your Honor, to—

Testimony of Glenn W. Ginter

Mr. Soeffing: Strike the question, strike the question.

By Mr. Soeffing:

Q. Do you have the cooler now? A. Yes, sir.

Q. Did you receive it in the last couple of years, or prior to that?

Mr. Schaefer: Objection, your Honor.

The witness has already stated he does not recall, and as long as I am interposing an objection, I will also object as to the questioning seems to be going far beyond what is relevant to Count 3 of the Complaint.

Mr. Soeffing: Your Honor, first of all I think that to handle the question, as I recall, in these hearings in Washington we had a large number of, let's say, discussions or confrontations about exhausting the memory of a witness before you went on to something else, [2467] or another way to refresh it.

I only asked him one question. He said he could not recall. I was trying to make it a little more specific, and that was only the second question trying to elicit the recall.

I think I am entitled to a second question. I don't intend to ask him about it five or six times.

Judge Hinkes: I think the question is proper as far as refreshing his recollection is concerned; whether it's applicable to Count 3, though, is another matter.

Mr. Soeffing: I have no way of telling now, your Honor, if it might not be applicable to Count 3. I can't see any real basis for objection.

I am advised, your Honor, that it will be fine if we eliminate it to Count 3, too—we will eliminate Count 3 as to the relevance.

Testimony of Glenn W. Gintert

Judge Hinkes: As to this question?

Mr. Mathias: As to this point, your Honor.

Mr. Soeffing: Yes, as to this point.

Judge Hinkes: Now the pending question is whether you have a cooler presently, and your answer was "yes"?

The Witness: Yes, sir. Yes.

Judge Hinkes: Now you may go on from that [2468] point, Mr. Soeffing.

By Mr. Soeffing:

Q. Did you receive it, say, in the last couple of years or prior to that, if you can remember? A. Probably prior.

Q. And did you ever receive any promotional aid or promotional material from Borden Company during the period 1966 through 1970?

Mr. Dembrow: Can I please have that question read back again?

By Mr. Soeffing:

Q. Did you ever receive any promotional materials or advertising help from Borden through the period 1966 through 1970? A. Yes, sir.

Q. What kind were they? A. Just banners, flyers.

Q. How often was this done? A. Just periodically. I couldn't say.

Q. By "periodically" what do you mean? A. Once every two or three months. Seasonalized I would say, yes.

Q. Yes.

Now, Mr. Gintert, did the Borden Company ever aid you in obtaining any loans in connection with your [2469] business? A. No, sir; not me personally.

Q. I mean the Wilco Food Center. A. Yes, sir.

Testimony of Glenn W. Gintert

Q. Do you know how they—how they did that? A. No, sir.

Q. Were these loans taken out from a bank?

Mr. Schaefer: Objection, your Honor.

He already testified that he does not know how Borden did this, and it seems to me that further questioning is, by Complaint Counsel would be in the nature of leading the witness, and not appropriate.

Mr. Soeffing: Your Honor, number one, I don't think—I think Mr. Schaefer is slightly confused. I think the loan was made to Mr. Gintert and not to Borden, and then to Mr. Gintert, so I don't think that that objection is valid.

And second of all, I don't think it's leading the witness because I think that is the kind of a question that can be answered "yes" or "no" without suggesting an answer to the witness.

Either he received a loan from the bank or he didn't receive the loan from a bank, and that can be very easily answered "yes" or "no."

* * * * *

【2493】 * * *

Q. During this period of time, '65 to '70, was Wilco a member of any cooperative organization? A. Yes.

Mr. Soeffing: Your Honor, I'm going to object, a very limited type of objection.

I think on direct we went into the period 1966 to 1970. Insofar as Mr. Dembrow covers the same ground, I think he ought to restrict himself from 1966 to 1970. I have no objection to the basic question itself.

Mr. Dembrow: I was not aware that all of—

Testimony of Glenn W. Ginter

Mr. Soeffing: Not all of them were.

Mr. Dembrow: —Complaint Counsel's questions were limited to the period '66 to '70, but I believe that—

Mr. Soeffing: I said insofar as they cover the same period.

Judge Hinkes: Well, in any event, since we're not sure of that, I'll allow the question, but I think it should be made more specific with respect to any differences that may have existed between '65 and '66.

Mr. Soeffing: Thank you, your Honor.

By Mr. Dembrow:

【2494】 Q. Mr. Ginter, during this—I think you just stated during this period of time that Wilco was a member of a cooperative organization. A. Yes, sir.

Q. Now, which cooperative organization would that be? A. Central Grocers.

Q. And during—did Central Grocers have their own brand of milk which they offered to Wilco during this period of time? A. I don't think so. I'm not sure.

Q. Was there a brand of milk called Centrella Milk? A. There was. I don't know whether it covered this period of time. I know there is now.

Q. I see. Do you recall, is the Centrella brand of milk more than a few years old? Is it—well, do you recall when you first heard of this Centrella brand of milk? A. Probably three or four years ago. I'm not sure on that.

Q. Do you recall whether when Centrella brand of milk first came out, if it was offered to you as a member of the cooperative? A. I'm not sure.

Q. Do you recall at any time before 1970 whether Central Grocers made you aware that they had a brand of
【2495】 milk called Centrella that you could purchase?

Testimony of Glenn W. Gintert

Mr. Soeffing: I'm going to object to that. I think that any time before 1970 is a long time. If you could make it just a little more specific—

By Mr. Dembrow:

Q. Any time between 1965 and 1970. A. I couldn't say that.

Q. Did there come a time when it was offered to you, this Centrella brand? A. Yes, sir.

Q. Do you recall when that was? A. No, sir.

【2496】 Q. Do you recall what the price of Centrella was in relationship to the price you were then paying for Borden and Dixie? A. No, sir.

Q. Were the prices for this Centrella brand lower than the prices you were paying for Borden and Dixie? A. I think so.

Q. I am not sure whether we established a little bit earlier, Mr. Gintert, in regard—were the prices—I don't remember if I did ask this question, the relationship between the prices you were paying for Borden and Dixie.

Mr. Soeffing: That has been asked.

Mr. Dembrow: That has been asked.

Judge Hinkes: Yes.

Mr. Soeffing: I think, your Honor.

Judge Hinkes: Yes.

Mr. Dembrow: Thank you.

Judge Hinkes: Now let's be sure we understand. You said that you were a part of this co-op of Central grocers.

Are you still a part of that co-op?

The Witness: Yes, sir.

* * * * *

Testimony of Glenn W. Gintert

【2514】 • • •

By Mr. Dembrow:

Q. Mr. Gintert, I believe in your direct testimony this morning in regard to rebates that you received from Borden, you mentioned that you received an interest check. I believe that was the term you used? A. I think that's right.

Q. Would you explain what this interest check was? A. Well, that's just in the book as interest.

Q. In other words, this was a rebate that you received from Borden? A. Yes.

Q. For milk and dairy products? A. Yes.

Q. I believe you testified this morning that you received, during the period of time in question, '66 through '70, Wilco received one or two display cases from Borden. A. Yes.

Q. Would you know the approximate size, to the best of your recollection, of these cases? A. Well, they're just the standard display case. Probably two by three, something like that, two and a 【2515】 half by four.

Q. Would that be—the two by three that you're referring to, what measure are you using? A. Feet, two and a half feet by three.

Q. I think you also were asked some questions about a loan that Wilco received either from Borden or with Borden's assistance.

Do you recall about when this loan was received by Wilco? A. I think that was in '63 or '64. I wasn't involved in that, so I don't know of any of the details on that.

Q. Do you recall—I realize you say you don't recall the details, but if I just may, do you recall the approximate amount of this loan when it was initially received by Wilco? A. One was four thousand something. The other was \$16,000.

Testimony of Glenn W. Ginter

Q. Do you know when these loans were paid off? A. No, sir.

Q. Do you know the period during which these loans would have been paid off; in other words, how long a period for each of these loans were? A. No, sir.

* * * * *

【2522】 * * *

At about that same time, was there any other changes in the method of delivery to you by Borden of their milk and dairy products? Did anything else change at that time? A. I think about that time is when they didn't want to guarantee the—the only thing they guaranteed would be the damaged stuff that, or spoiled stuff that was—if they brought it in out of date. If it was our negligence, why, we had to suffer the loss.

【2523】 Q. Right. You are saying that this was a change. What was the change from? In other words, what was the practice prior to this change, prior to this change did Borden guarantee— A. Guaranteed everything.

Q. In other words, prior to this change Borden took the risk of all non-salable merchandise? A. Yes.

Q. After this change occurred, Borden would only be responsible for damaged packages? A. Yes, sir, or outdated stuff that they brought in.

Q. Stuff that they brought in that was already out of date? A. Yes.

Q. And if I may, at about this same time—and you testified there was a change as to ordering, and a change as to what products would be returned to Borden; was there also a change as to special deliveries? A. Yes, sir.

Q. Can you establish at all when this change took place— A. No, I can't.

Q. —during this period? A. (Shaking head.)

Q. Do you have any idea of the year it occurred? A. I would say it was about '66, '67, in there, but * * *

* * * * *

Testimony of Glenn W. Gintert

【2526】 Q. So you would not know what the markup of the retail price markup was— A. No, sir.

Q. —over wholesale.

Mr. Gintert, do you recall during this period of time, '66 through '70, what the most competitively priced single milk package was in terms of container size or product? A. Probably the half-gallon.

I couldn't—that was the fastest selling item, so I would imagine that would be the—

Q. Was the gallon jug a very competitive—gallon jug of milk a very competitively priced item during that period of time? A. No, I don't think so.

Q. Mr. Gintert, during this period of time there was some questions this morning about advertising.

Did you advertise, Wilco advertise homogenized milk very much? A. Very seldom.

Q. Would you say that this would have been true of A&P also in terms of advertising homogenized milk? A. Right.

Q. Mr. Gintert, do you recall during this period of time, '66 through '70, whether A&P introduced private-label [2527] milk and dairy products? A. I can't recall for sure.

Q. Do you recall—you say you can't recall for sure whether they did or when—or when they did? A. Either one.

Q. Are you aware at some point during this period, '66 through '70, that A&P was selling private-label milk and dairy products? A. Yes.

Mr. Dembrow: Your Honor, I am almost complete with my cross examination, and we have been going for a while.

I wonder if we might take a short recess so I can check my notes.

Judge Hinkes: Very well.

Testimony of Glenn W. Gintert

We will take a five-minute recess.

I think that in view of the near completion of cross examination that perhaps you, Mr. Schaefer, can prepare for your cross examination, if you have any.

Mr. Schaefer: I will do so.

Judge Hinkes: Very well.

(Short recess.)

* * * * *

【2531】 * * * you called one of these rebates an interest check, but that you are unaware of what exactly that referred to; is this correct? A. That's right.

Q. Were you aware, during the period of time in question, of any loan that was made by Wilco to Borden? A. (Shaking head.)

Q. I believe you will have to, for the Reporter's benefit,— A. No.

Q. Mr. Gintert, during each of the years from 1965 through 1970, is it correct to state that your net sales in dollar amounts increased each year? A. Yes, sir.

Q. And during the same period from '65 through '70 is it correct to say that each year your gross profit increased in dollar amount? A. Yes, sir.

Q. And, Mr. Gintert, is it also correct to state that during this period, '65 through '70, this five-year period, that your net profit before taxes increased more than 50 percent between 1960—1965 and 1970? A. I am not sure of the exact percentages, but it did 【2532】 increase.

Q. Yes. Is 50 percent approximate? A. I couldn't say. I don't remember the figure. You have the figures.

Mr. Dembrow: Your Honor, subject to the request to examine the documents we have referred to, we have no further cross examination at this point.

Testimony of Glenn W. Gintert

Mr. Soeffing: Your Honor—

Judge Hinkes: Yes.

Mr. Soeffing: —I just want to point out that the questions about the rebates on direct examination were as to the method calculated, and general questions, and I don't think we ought to have any deferred cross examination.

We didn't go into any detail on the rebates or figures, and numerous figures, calculations, and I think it's beyond the scope of direct to defer cross examination on that kind of a—

Mr. Dembrow: Your Honor—excuse me.

Your Honor, I believe that Mr. Soeffing has incorrectly portrayed his direct examination.

I recall questions about the amounts of rebates, and whether one was larger than the other, and approximate dollar amount of various checks.

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Testimony of Christopher Lasorso

July 18, 1973

* * * *

【2650】 * * *

Q. How important is milk to your operation, or was it during this period? A. Well, I imagine that it's our number one commodity for our customers to come in for, and that's at least three times a week, maybe more.

Q. Are customers generally familiar with milk prices?
A. Very much.

Mr. Curnin: Objection, your Honor.

Judge Hinkes: On what basis?

Mr. Curnin: No foundation.

Judge Hinkes: I'll allow the question, but I would expect you to follow that up with some inquiry as to how he has that information.

Mr. Stone: I believe, your Honor, that the testimony has already indicated that customers remarked as to prices.

Judge Hinkes: Yes, but your question is concerning what, now?

Mr. Stone: Milk.

Judge Hinkes: Well, what do you want to know
【2651】 about milk?

Mr. Stone: I wanted to know if customers were generally familiar with milk prices.

Mr. Curnin: And I object to that question, your Honor.

Judge Hinkes: Well, would you know, Mr. Lasorso, if your customers were familiar with milk prices?

The Witness: I believe they would be, yes.

Judge Hinkes: Now, why do you base—on what do you base that answer?

Testimony of Christopher Lasorso

The Witness: Well, it's a commodity that they buy—if they don't buy it every day, at least two or three times a week.

Judge Hinkes: Yes, but what makes you think that they are familiar with the prices?

The Witness: Well, it's an item that, like I said, that they buy—it isn't an item—like they'll buy coffee and say, "Well, I buy that in a two-pound can, it will last me for two weeks or one week", you know. I mean, it's milk. It's an everyday item, and they're more conscious of things they buy every day than they are of things that they buy once every two weeks or once a week.

* * * * *

[2676] * * *

By Mr. Curnin:

Q. You mentioned, sir, that you had been approached during this period of time by other dairies. A. Yes.

Q. What dairies contacted you during this period, 1966 to '70? A. I think it was Deans.

Q. And do you recall when that was, sir? A. Not exactly the date. Sometime in that.

Q. Do you recall if it was in 1966? A. No, I don't think so, because we just had started more or less with, with Bordens.

Q. I thought your testimony was, sir, that you opened in 1963, '63,— A. Three, yes.

Q.—'64? A. Yes.

Q. And that you opened with Bordens at that time.

Now I am asking you generally about a period two years later; would it have been in 1966 that you were contacted by the Dean milk company or maybe the name is Dean's Foods? A. No, I really—I couldn't swear to the time, but they were there sometime, I don't remember when exactly.

Testimony of Christopher Lasorso

【2677】 Q. And what proposal did they make to you at that time, sir? A.. Well, they offered me more rebate.

Q. Higher than Borden? A. Right.

Q. And can you tell us as best you can recall what was the rebate that you were receiving from Borden at the time you were approached by Dean? A. I believe it was 25.

Q. And Borden was offering you 25 percent off list? A. Off list.

Q. And what did Dean offer you off list? A. I believe it was about 27 to 29. I think we were bickering.

Q. In addition to offering you a higher discount off list, did Dean offer you anything else? A. No.

Q. During this discussion that you had with the Dean representative, did he tell you that they would also afford you regularly special promotions? A. Well, I only talked to them a couple of times, and it was—I was very much satisfied with Bordens, and, I mean, when I heard I could get more from Deans, I called Bordens and their sales manager came out and he said he will see what he can do for me, and he brought 【2678】 up my percentage.

Q. In other words, he matched the proposal— A. That's right.

Q. —that you had from Deans? A. (Nodding head.)

Q. And it was at this time, then, that your discount off list was increased to 29 percent, or thereabouts? A. Yes.

Q. Now, when the Borden representative increased your percentage, did he ask you for any proof of the proposal that had been made to you by Dean? A. No, he didn't.

Q. During this discussion, or series of discussions that you had with Dean, did they offer you anything else for your business, such as did they say, "If you take on Dean milk we will give you some equipment for use in your store"? A. No, there was no mention about equipment.

Q. Did they offer anything else to you, sir, of value, of any description? A. Not that I know of. They were just giving me—their label was well accepted, Deans.

Testimony of Christopher Lasorso

Q. In your market? A. Yes.

* * * *

【2692】 * * *

Q. Well, would it be your testimony that during the period 1966 you believe your prices were competitive with A & P and Jewel on milk and dairy products? A. I believe so.

Q. And does that mean as far as you can recall, sir, that the prices were the same? A. Yes.

Q. During the period 1966 in your area, what was the most competitively priced milk package? A. Gallons.

Q. And was that also the package in which the greatest quantity of milk was sold? A. Yes, that's the biggest one.

Q. And at any time during 1966 were you approached by a dairy other than Borden, at which time they offered to sell you milk and dairy products? A. I said Dean's had approached me.

Q. Anybody else in addition to Dean on the Dean label? A. I think Wanzer was—Wanzer milk, Wanzer Milk Company.

Judge Hinkes: You said that Dean approached you, but if I understand your earlier testimony, you weren't sure of the date, and now you're answering the question, 【2693】 and the question relates to 1966. Now, is that your testimony that it was Dean in 1966?

The Witness: Well, I thought any period of time, but Dean was in the early part.

Judge Hinkes: "Early part" meaning what?

The Witness: 1965 or '66. And Wanzer was later, much later.

Testimony of Christopher Lasorso

By Mr. Curnin:

Q. Wanzer was beyond 1966? A. Yes.

Q. And was the price that they offered to you better than the price that you were then receiving from Borden? A. I believe so on the basis of list price, but I didn't know what their list price was.

Q. But you understood their price to be better than the Borden price? A. Well, I was more concerned with percentage of the rebate off the list.

Q. Well, how were you judging the prices? A. Well, if I—if I would have got the price list from them, you know, and then I would take Borden's and compare them, what's the use getting a bigger percentage back if you're paying more money for the milk?

Q. I mean, is it your testimony, sir, that they offered you a bigger discount but you didn't know what that [2694] discount was going to be off? A. That's right.

Q. Did you have any discussions with the man from Wanzer at that time that you'd like to know what that was and you'd be able to judge his price? A. Well, I tell you what, we just talked once, and I really wasn't interested in taking another dairy, because I had proven I had good faith in Borden's, and my customers accepted it, and I didn't feel as though I wanted to trade and start all over again trying to educate my customer to a new product.

Q. And did you also feel that there would be a certain amount of trouble if you had two dairies supplying you? A. I really don't know if we would have trouble.

Q. Having two dairies supply and dual billing and the like? A. I—I never questioned that if we would have a problem or if we would split the stock.

Q. Were you contacted by anybody else, sir, any other dairy during the period—year 1966? A. No.

Q. Now, were you a member of Grocerland in 1966? A. Yes.

Testimony of Christopher Lasorso

Q. Now, did Grocerland offer to its members a private label brand of milk? **[2695]** A. No, they didn't.

Q. Did they at any time in 1965? A. No, they didn't.

Q. Did they offer a private labeled brand at any time during the period '66 to '70? A. No, they didn't.

Q. They offered only what, the general Grocerland line, sir? A. Just the Grocerland.

Q. You may have mentioned this before, sir, but would you tell me again the percentage of discount that you were receiving from Borden in 1966? A. I believe it was 25 percent.

Q. And did it remain constant through the year or did it change at any time in 1966? A. I forgot exactly when it was changed, but it was changed to 29. I don't remember if it was the following year.

Q. But it may have been in 1966 that it changed to 29 percent? A. It might have been. I'm not sure.

Q. And this was a discount off the list price? A. Yes, sir.

Q. Did you ever see a Borden discount schedule in 1966? A. I don't remember.

[2696] Q. You answered some questions for Mr. Stone this morning about the services you were receiving from the Borden Company in 1966. There may have been some aspects of that service that he didn't cover which I'd like to cover with you now, sir.

How many days a week did you receive milk from Borden in 1966?

Mr. Stone: Your Honor, I would object. The witness testified about rebates, and he testified about monetary help he may have received from Borden, and he testified about no other services.

Judge Hinkes: The present question has to do with deliveries.

Mr. Stone: Yes, your Honor.

Testimony of Christopher Lasorso

Judge Hinkes: I'll allow the question. That could be considered as a type of an aid furnished to a retailer. In other words, more deliveries, less deliveries that has some effect as an aid.

Mr. Curnin: Would you repeat the question for the witness, please?

(Question read.)

The Witness: In 1966, we were still getting six-day delivery.

By Mr. Curnin:

Q. And during 1966, did you receive special deliveries [2697] from the Borden Company on milk and dairy products? A. It happened.

Q. Now, would you describe for us, sir, your store as it existed in 1966? For instance, how many square feet did you have? A. I had 5,500 square feet.

Q. And where was your cooler located that you used to store milk, dairy products, and other things that required refrigeration? A. At that time we had a—excuse me—we had a cooler in back, but most—all the milk went into my dairy case in the selling area.

Q. It was delivered into the case by the Borden driver? A. No, it was delivered to the case.

Q. In other words, he would wheel the milk through the store and he would stack it by the dairy case? A. He'd leave it there. We'd stock it.

Q. No, but he would bring the milk in and deposit next to your dairy case? A. Right.

Q. He did not deliver it to the cooler, although you had a cooler? A. (Nodding head.)

Judge Hinkes: The answer is yes?

The Witness: Yes. I'm sorry.

Testimony of Christopher Lasorso

【2698】 By Mr. Curnin:

Q. At the time he delivered milk to your stores, did the Borden driver check your stock to determine if you had any out of date merchandise? A. Yes.

Q. And would he remove that stock from the dairy case? A. Yes.

Q. And would he also rotate some of the stock that was in it to be sure that the older dated merchandise was being brought forward? A. We usually took care of that. The only thing he'd look for was the out of code.

Q. But were there occasions, sir, during 1966 when he assisted your dairy man or stockman—I don't know how you describe him—in rotating stock in your dairy case? A. Yes.

Q. All right. In addition to checking stock in the dairy case and removing outdated merchandise, did the driver also prepare the order for the next delivery? A. Yes, but, now, say our—we sold a hundred gallons of milk a day, his job was just to build it up to a hundred. If I sold 60, he would leave me 40. He knew better than I did, you know.

Q. And because he knew better than you did and because he was checking your dairy case, he was the one who was
【2699】 making out the order? A. Right.

Q. In addition to these visits, deliveries by the Borden driver, were you also visited by a Borden salesman during the course of 1966? A. Yes.

Q. And for what purpose would he visit your store? A. Goodwill ambassador.

Q. Would he also bring with him some materials, point of display type advertising which might be beneficial to you in the sale and promotion of milk and dairy products? A. Yes.

Q. When outdated merchandise was removed from your

Testimony of Christopher Lasorso

store by the Borden driver, would you get a credit for that merchandise? A. Yes.

Q. In other words, Borden ran the risk of spoilage? A. Yes.

Q. Were you advised by Borden at any time during 1966 that you would—were entitled to receive or could receive an additional discount if you did the pre-ordering? A. It was never mentioned to me.

Q. Did the Borden driver or any Borden representative at any time in 1966 advise you that you could receive an additional discount if you ran the risk of spoilage on [2700] outdated merchandise? A. No.

Q. Now, the discount that you received during 1966, is it your testimony that that was an across-the-board discount? A. Yes.

Q. On total dollar volume of milk and dairy products purchased? A. Yes.

Q. Now, in addition, did Borden offer you, during 1966, specials on dairy items? A. Yes.

Q. And the value of that would be what, five or ten cents an item? A. Depends what they were—they had a program every week, they would run one particular item every week, and all the stores got that.

Q. And this was of value to you in promoting the sale of dairy products in your store? A. Yes.

Q. And the amount of the reduction, how was that reflected, in a lower net billing to you, or did you receive—I mean, in other words, did you receive a credit? A. No. It would be—they would—on the net billing [2701] they would reduce the price on it. If it cost 42, and they gave you a nickel off, they charged you 37.

Q. And that, a net charge was reflected in a reduction off the— A. List.

Q. —billing price? A. Right.

Q. They did not supply you with a check? A. No.

Testimony of Christopher Lasorso

Q. During the year 1966, did Borden supply you with certain items to decorate your store, such as balloons and streamers, and things of that sort? A. They only did that for a grand opening.

Q. Just for the grand opening? A. (Nodding head.)

Q. They didn't do it at any time during the holiday season in 1966 in connection with certain holiday promotions that they might be having? A. I don't think so.

Q. Is it possible, sir, that that occurred during 1966, that such material—

Mr. Stone: I'll object to speculation.

Judge Hinkes: As possible as anything. Let's try to rephrase that.

* * * * *

Judge Hinkes: Well, that is not the issue. The issue is the connection between the payments and the cost of milk from Borden. That is the connection I am looking for.

I don't care to know the details of his payment on a freezer that is not involved in the milk sale or purchase.

Mr. Curnin: But the witness has testified, I believe, your Honor, that this is part of his over all dealings and his over all relationship with the Borden Company.

Judge Hinkes: And that was not sufficient when you raised the objection to allow the question to go on.

No, I am going to sustain the objection.

By Mr. Curnin:

Q. Is it true, Mr. Lasorso, that the net sales of Mayfair Foods in terms of dollars increased in 1966 over that which

Testimony of Christopher Lasorso

it had realized in 1965? A. I don't have the figures, but I know we did increase, but I am not sure if it was '66 or '67, but—

Q. And did your gross profit in terms of dollars increase in 1966 over 1965? [2716] A. No.

Q. I show you these documents, Mr. Lasorso, and ask you if that—these documents CX-184-B and sub parts 184-G sub parts refresh your recollection? In 1965 your company reported gross receipts six hundred one odd thousand dollars, less cost of goods, four hundred seventy-five odd thousand dollars, gross profit \$126,000.

Mr. Stone: Your Honor, I see no reason for reading these tax returns into the record.

Judge Hinkes: The document, Mr. Curnin, is already in evidence, and if the witness has made a mistake, that can be clearly demonstrated.

Are you seeking an admission from the witness that he made a mistake? I don't quite understand it.

Mr. Curnin: Well, I just want to refresh his recollection, your Honor. He said that gross profits in terms of dollars did not increase in 1966 over 1965 based upon cost of—gross receipts less cost of goods sold, and now I'm showing him the tax returns of the company to ask him if that refreshes his recollection that it wasn't otherwise.

The Witness: Yes.

By Mr. Curnin:

Q. Gross profits in 1966 in terms of dollars was higher than that of the company in 1965? [2717] A. Yes.

Q. Thank you, sir.

To your knowledge, sir, did A & P's sale of private labelled milk and dairy products during the month of February and March 1966 injure your business? A. No.

Testimony of Christopher Lasorso

Mr. Stone: I object, your Honor.

Mr. Curnin: He's answered the question, your Honor.

Mr. Stone: It calls for speculation.

Judge Hinkes: Well, are you asking that the answer of the witness be stricken?

Mr. Stone: Yes, your Honor. I see no probative value.

Judge Hinkes: Well, the witness is certainly an expert at his own business, and he has answered that certain behavior had no competitive effect on his business. To that extent, I think it's permissible as an answer. I'll overrule the objection.

Mr. Curnin: I have no further questions of this witness at this time.

Judge Hinkes: Mr. White.

Mr. Stone: Your Honor, might I inquire if that means that Mr. Curnin's cross-examination is closed?

Mr. Curnin: Unless something comes up on the [2718] basis of Mr. White's examination or any redirect by counsel.

Judge Hinkes: I take it that when counsel tells me that he has no further questions, that's it, and he'll only be permitted recross at a later time under circumstances that warrant it.

Mr. White.

Mr. White: Thank you.

Cross-Examination by Mr. White:

Q. Sir, during 1964, '65, '66, during that period that you were purchasing milk products from Borden, did you from time to time receive from Borden price lists for those products, the prices you were being charged from which the discount was being calculated? A. Yes.

Testimony of Christopher Lasorso

Q. And those were normally mailed to you or given to you by the route driver? A. By the route driver.

Q. This afternoon you told us about the incident where the Dean representative solicited your business and offered you a discount and it ranged from 27 to 29 percent, and that you then called Borden and explained this to a Borden representative; is that correct? A. Right.

【2719】 Q. Did you tell the Borden representative that Dean had offered you that discount? A. I believe so.

Q. Did you tell the Borden representative the truth? A. Yes, I did.

Q. Now, you've mentioned this Termis Liquor Store, I believe you said was the name of the store, which was in the same block that you were located. A. Across the way from me.

Q. Did I understand correctly that this store in particular sold gallons of homogenized milk? A. Yes, sir.

Q. And that was a large item in that store? A. Yes.

Q. From your observation of your own customers and of being in that liquor store, was that liquor store selling a lot of milk? A. I believe so.

Q. It was a very active competitor of yours in the sale of milk; is that correct? A. Right.

Mr. White: That's all, your Honor.

Judge Hinkes: Any redirect?

Mr. Stone: If I might just have about a half a minute to confer with counsel.

* * * *

Testimony of Manley Minard

July 23, 1973

* * *

Q. And would that be true through the period of '66 to '70? A. '66 through '70, I believe we—it seems that we quit buying from Borden in our Valparaiso store in January of 1970.

Q. In January of 1970? A. I think that's correct.

Q. And who became your dairy supplier at that time? A. Home Dairy.

Q. H-o-m-e? A. Right.

Q. Are they a local dairy, sir, as you would describe it, or— A. No, they are not.

Q. Where do they operate from? A. From Bern, Indiana.

Q. Bern? A. B-e-r-n.

Q. And how far away is that from your Valparaiso store? A. Approximately 120-30 miles.

Q. During the period 1966 through 1970, was Home Dairy operating in the Valparaiso area? A. No.

【3183】 Q. When did they come into the Valparaiso area? A. Well, they weren't, to the best of my knowledge; I assume that they came into the Valparaiso area when they began delivering milk to us.

Q. You don't recall their being in the area servicing others, or soliciting customers prior to January of '70? A. Not to my knowledge.

Q. When were you first solicited by Home Dairy? A. Some time in 1969, I think.

Q. Beginning of the year, middle of the year? A. I have no idea.

Q. Did you handle the negotiations, sir? A. Yes.

Q. Would it have been in the second half of 1969? A. More than likely, yes.

Q. Did Home Dairy offer to serve any of your other

Testimony of Manley Minard

stores, and specifically, your stores in Gary and Highland?

A. Yes.

— Q. Did you switch to Home Dairy in January of 1970 because they offered you a better price? A. Yes.

Q. —than you were then paying the Borden Company? A. Yes.

Q. And did they offer you any additional services or other benefits? **[3184]** A. Yes, weekly specials.

Q. Anything else, sir? A. No.

Q. Is the method of delivery by Home Dairy to your Valparaiso store the same as it was when you were receiving milk from the Borden Company? A. In Valparaiso, Yes.

Q. Yes.

So that you switched to Home Dairy because they offered you weekly specials, and better milk prices and better prices on dairy products? A. Right.

Q. When you stopped dealing with Borden in January of 1970, was there any equipment or whatnot on the premises that you had to return to the Borden Company? A. Yes, there was equipment on the premises.

Q. What equipment was returned to Borden in January of 1970? A. There was no equipment returned in January.

Q. I may have misunderstood your testimony, sir. I thought there was some equipment on the premises that was returned to Borden at this time. A. No, I am sorry. I misunderstood the question.

There was some equipment belonging to Borden on the premises.

[3185] Q. Well, in January of 1970 did they pick that equipment up? A. No, they did not.

Q. They left their equipment there? A. Yes.

Q. Did you buy it from them? A. No, I have not.

Q. The equipment still belongs to Borden? A. Yes.

Q. Have there been any discussions between you and Borden as to the return of the Borden equipment? A. Yes.

Testimony of Manley Minard

Q. And can you tell us about those discussions, sir, what they said to you and what you said to them? A. Well, there has been a long range of discussions immediately thereafter, after the change, suggested by them. They would —we haven't determined what the equipment is.

Q. Yes, will you identify the equipment for us? A. Okay.

The equipment is a dairy cooler.

Q. Used for what purpose, sir? A. For milk storage and dairy products storage.

Q. Is this a walk-in cooler? A. Yes.

Q. How big is it? [3186] A. (No response.)

Q. In approximate square feet, is it ten feet wide and twenty feet long? A. I would say ten by sixteen.

Immediately after we left, quit buying from Borden and Company in Valparaiso, the discussions of the cooler came up, and it was decided then by Mr. Joe Hines, who worked for Borden at that time—and still does—that perhaps he would just leave it there for a while, and we will think about it, and maybe we won't continue buying from Home, we will go back with Borden, and so that kind of rested for a long while.

Subsequent discussions were "how about buying it?"

"No, I don't want it. How much do you want for it? That is too much. Come and take it out."

"Well, let's let it go for a while."

That is still going on at the present time.

Q. That is the present status? A. Right.

Q. Is it still being used by you, sir? A. Yes.

Q. When did you receive this dairy cooler from the Borden Company? A. It was in two stages. Dates are pretty tough.

It seems like 1967 they placed a dairy cooler [3187] outside the store. At a later time, when we were remodeling,

Testimony of Manley Minard

they added to that same dairy cooler, and it was placed inside a newly-built back room area.

Dates escape me.

Q. But your recollection is now that you received a cooler from them in 1967? A. Yes.

Q. And when did you remodel the store, sir? A. In '69, I believe.

Q. And then did they transfer that outside cooler into the remodeled area, or did they bring in a new cooler? A. We merely built around it, and they enlarged the same cooler that was on the outside.

Q. They enlarged the capacity of the cooler— A. Right.

Q. —that you had for a two-year period? A. Yes, sir.

Q. Did you have the use of this cooler without charge from the Borden Company? A. Yes.

Q. Did they—and by "they", I mean the Borden Company, did they maintain it? A. No. It was our obligation to maintain it.

Q. You maintained it and you supplied the electricity? A. Right.

【3188】 Q. In 1969, did you enlarge the Valparaiso store? A. Yes.

Q. And in addition, did you modernize it? A. Yes.

Q. And did you do so to take advantage of the increased business that that store was experiencing in an effort to further increase the business? A. Yes.

Q. What? A. Yes.

Q. How large was the store, sir, prior to its enlargement in 1969? A. Approximately 25,000 square feet.

Q. And it was increased to what size? A. 35.

Q. You testified, I believe, that the Home Dairy offered to serve your stores in Gary and in Highland in 1969; is that true, sir? A. Right.

Testimony of Manley Minard

Q. But you decided not to take them up on that offer?
A. That's right.

Q. And why was that, sir? A. It was a new dairy. We didn't know how it would do. We decided to try it in one store and see how it worked out.

Q. How has it worked out in your Valparaiso store?
【3189】 A. Extremely well.

Q. Have you transferred them, or given them additional stores to service? A. Yes.

Q. And what stores are they serving now?

Mr. Mathias: Your Honor, I am going to object to this further line of questioning because it obviously goes beyond the 1970 period—at least it appears to me that it does.

Complaint counsels evidence only goes through March of 1970, and this inquiry would appear to be irrelevant to the issues of this case.

【3190】 Judge Hinkes: It seems you are going beyond the 1970 period.

Mr. Curnin: May we determine, your Honor, from the witness just when the changes occurred?

Judge Hinkes: All right.

Mr. Curnin: And if it's beyond the period, then it's beyond the period.

The Witness: June of '70, as I recall.

By Mr. Curnin:

Q. June of '70? A. Right.

Q. In June of 1970, what stores did they commence serving?

Mr. Mathias: Your Honor, I'm going to object.

Judge Hinkes: I believe you have the cutoff of March, '70, don't we?

Testimony of Manley Minard

Mr. Curnin: Well, we do, your Honor. However, I think I'm entitled, as a background question, to find out when the stores, or the service to the stores started, and then to go back as to when the negotiations commenced and when they decided to accept.

Mr. Mathias: Your Honor, I'm not too sure—

Mr. Curnin: And I think that that's relevant, for obvious reasons.

Mr. Mathias: Your Honor, those obvious [3191] reasons escape me completely. I don't see what difference or what bearing on this case this witness' dealings with Home Dairy have at all. I—so I do not believe that the relevance is so obvious.

Judge Hinkes: I'm going to sustain the objection to the question.

The question as now posed is fairly narrow. The inquiry is whether—is as to what stores began receiving the Home Dairy milk in June, 1970. Now, that, I think, is totally irrelevant, and I think that I must sustain the objection.

By Mr. Curnin:

Q. Did you, prior to March of 1970, enter into negotiations with the Home Dairy to supply your two stores in Gary and/or your store in Highland? A. Yes.

Q. And when did you enter into those negotiations, sir? A. They were going on continually.

Q. Starting at what time? A. Sometime in the latter part of '69.

Q. And the Home Dairy offered to sell milk to all of your stores at a price below that which was then being charged to you by the Borden Company? A. Yes, sir.

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Testimony of Manley Minard

【3208】 * * *

Q. But Borden salesmen would call on you, sir? A. Oh, yes.

Q. Who ran the risk of loss for spoilage during this period of time, '66 to 70? A. Generally, the dairy service.

Q. During this period of time, did you get in-the-store promotional material from Borden for your five stores? A. Yes, on occasion.

Q. And did they ever send around demonstrators to your stores? A. Yes.

Q. And did you also receive weekly specials on dairy products? A. Yes, we did.

Q. Five and ten cents off items? A. Generally not that much, but three to five.

Q. Did you receive on occasion from Borden during this period of time in these stores free samples? A. Yes.

Q. And did you receive from them assistance at the time of opening of a new store or the refurbishing of an existing store? 【3209】 A. Yes.

Q. And what would that consist of? A. Well, generally during an opening, it would involve some free samples to pass out to customers as a giveaway, and, oh, help of one or two of their people for a few days, or one day during the opening, just general help to take care of their stock or help customers in general.

Q. You mentioned that—excuse me, sir. A. As I stated, the dairy cooler.

Q. Pardon me? A. The dairy cooler that we have already talked about.

Q. They would go in and rotate the stock? A. No, no. I mean the, allowing us to use a walk-in cooler.

Q. Here you have reference to the walk-in cooler at the Valparaiso store— A. Right.

Q. —that you had starting in 1967? A. Um-hmm.

Testimony of Manley Minard

Q. Did you have the use of coolers or other equipment in any of your other stores? A. No.

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【3223】 * * *

Q. Would you explain to us what that represents, and how it was calculated? A. I don't know exactly how it was calculated. I can tell you the theory of it. It was a, simply a loan we, Joe Tittle and Sons borrowed, borrowed money, and for which we repaid principal and interest. Borden subsidized the interest in some amount. I am not quite clear exactly how—for example, if we paid seven percent, they perhaps reduced the interest payment by two percent.

The checks were, as I recall, decreasing in value each month through this period.

Q. Did the interest subsidy payments vary— A. Yes.

Q. —during this six-month period? A. Yes.

Q. And did you receive any interest subsidy payments, both before and after this period? A. Yes, we must have.

Q. When did you take out the loan? A. I—I can't—I don't know that.

Q. What was the amount? A. To the best of my knowledge, it was \$200,000.

【3224】 Q. What bank? A. (Shrugging shoulders.)

Q. You don't know, sir? A. I do not know.

Q. Did Borden help Joe Tittle and Sons get this loan? A. I—as I recall, they did.

Q. And the interest subsidy was two percent, as best you can recall, on the total interest payments? A. As best I can recall.

Q. And how often did the company receive that payment? A. Monthly.

Q. And how was that money entered on the books? A. It was merely applied to that, that same account to reduce the interest payment.

Testimony of Manley Minard

Mr. Curnin: I ask Complaint Counsel if he has a copy of the Tittle Food Center's letter dated November 4, 1972, and if these documents were produced pursuant to a subpoena, I ask that we be shown a copy of the subpoena.

Mr. Mathias: You mean this November 4, 1972—

Mr. Curnin: Yes, that letter, if it was produced pursuant to a subpoena.

Mr. Mathias: It was not produced pursuant to a subpoena.

I do have a copy of the letter here.

【3225】 Mr. Curnin: I would like to show it, and the attachment, to the witness.

Mr. Mathias: You want the other copy as well, don't you?

Mr. Curnin: I have written on my copy.

Mr. Mathias: There may be writing on this copy. Let me see.

There is—if there is, I have no objection to him looking at it. There is writing on it.

Mr. Curnin: Is that an attachment to the letter?

Mr. Mathias: That is—these are some carbon copies—I mean, some Xerox copies.

Mr. Curnin: Of the same letter?

Mr. Mathias: Of the same attachments. I do not have any cleaner copy than that.

Mr. Curnin: No, but the letter in front of you, or the document in front of you looks to be different from the documents that I have in my hand.

Mr. Mathias: Those are my own personal notes, Mr. Curnin. Would you like to look at them? You may not.

Mr. Curnin: If it may be relevant, it may be worthwhile.

Testimony of Manley Minard

By Mr. Curnin:

Q. I show you this document and ask you if you are [3226] familiar with the—I have a copy, your Honor—are you familiar with the records which are attached—

Mr. Mathias: Your Honor, I would object to the characterization by this witness of what is attached to that letter.

Judge Hinkes: Well, the witness hasn't been asked to characterize.

Mr. Mathias: No, but Mr. Curnin, in his question, has characterized the attachments to that letter as records.

Judge Hinkes: Well, let's just ask the witness, then, if he is familiar with the attachment to the letter, what appears to be a three-page attachment.

The Witness: Yes.

By Mr. Curnin:

Q. Can you describe the first two pages that are annexed to this letter dated November 4, 1972? A. The interest expense and interest return? Is that the—

Q. No, the—all right. That is not the first one that I have, but going to that page, sir, which is headed "Ledger," — A. Um-hmm.

Q. —interest expense and interest return, what does that represent? [3227] A. It looks to me like the interest expense and interest return from Borden on the loan that we were discussing.

Q. In other words, under the column "Credits", those are the payments you received from Borden which you have described as being an interest subsidy for the period of time specified, September '65 through August of '66? A. Right. Yes.

Testimony of Manley Minard

Q. Will you look at the other pages, sir, and tell me what information is reflected on those sheets?

Mr. Mathias: Your Honor, I think—

The Witness: I don't know.

Mr. Mathias: —the witness has not yet been qualified to respond to those, to a question as to those sheets. It hasn't been shown that he is familiar with these particular sheets.

Judge Hinkes: There is nothing to indicate that this witness is at all involved in this communication, and he is not qualified to explain it, unless he has some personal knowledge.

By Mr. Curnin:

Q. Have you seen these sheets before? A. No, I have not.

Q. Do you know what form the company recorded rebate payments received from Borden? A. In a ledger.

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【3249】 * * *

Q. There is an entry on 30-C, No. 8, Bordens, and is that the interest payment again? A. Yes, again, correct.

Q. To your knowledge, does Respondent A&P Exhibits 30 and 31 represent the interest payments and rebates that the company received from Borden? A. Yes.

Q. Do you know whether or not it's a complete record of all the payments that you received from the Borden Company? A. I don't know. I would presume that it is.

Q. You did not prepare the record? A. No.

Q. I notice there is an entry here on 30-C, Borden Valparaiso, \$25.

What does that represent? A. I could only guess that an amount like that would be a payment for a demonstrator

Testimony of Manley Minard

or—and/or product used in a one-day sale, or something like that, or perhaps we used our own.

Q. But a rebate you received from the Borden Company— A. Yes.

Q. —applicable to your Valparaiso store? A. That would be different than the others.

【3250】 Q. My description of it is correct? A. Yes.

Mr. Mathias: Your Honor, I—I would strongly protest Mr. Curnin's describing the documents, figures herein.

The witness has stated that it is different from the other. I believe that if he wants to find out what this is about he should ask the witness rather than testifying himself on the record.

Judge Hinkes: The question was a little confusing, Mr. Curnin. When you said that your description was correct, what description were you referring to?

Mr. Curnin: I will go over it, your Honor. I thought that it was clear. I will have to go back now and find it.

【3251】 *By Mr. Curnin:*

Q. There's an entry here on 30G, Item.3 for the Borden Company, \$25 from—which is applicable to the Valparaiso store. A. Right.

Q. And that represents a rebate or a payment which you received—

Mr. Mathias: Your Honor, I object again to his characterizing it. He should ask him what it is.

Mr. Curnin: Well, the witness has already testified what it is. There's no confusion as to the record on that testimony.

Testimony of Manley Minard

Mr. Mathias: But he has not characterized it as Mr. Curnin is now characterizing it, your Honor.

Judge Hinkes: Well, it's still cross examination, Mr. Mathias, and it's permissible.

Mr. Curnin: Would you read the question?

(Question read.)

Mr. Mathias: Now, your Honor, I would object on the grounds that it's a dual question. He said "rebate or payment you received". Now, I do not believe that it's a sufficiently clear question.

Judge Hinkes: Well, if there's a difference, I think we ought to be clear about that.

By Mr. Curnin:

Q. Mr. Minard, this \$25 payment which is applicable to your Valparaiso store was a payment you [3252] received in connection with your dealings with the Borden Company? A. If it's entered in that ledger, and that's a copy of our ledger, that would be a payment received from Borden Company.

Q. And it's a payment received in connection with your purchases of milk and dairy products from the Borden Company? A. I don't know that for sure.

Q. Were you buying other products from the Borden Company other than milk and dairy products? A. No.

Q. So wouldn't it be correct to say, sir, that it would have to have been received in connection with your purchase of milk and dairy products from the Borden Company? A. In connection with our purchase, yes.

Q. There's an entry on 31 O, and I can't read which item it is, but it says "Borden, Inc.", and then there's a dollar payment \$65.49.

Can you tell me what that was for, sir? A. I can't identify that.

Testimony of Manley Minard

Q. Did the Borden Company offer Tittle a private label milk and dairy product during the period '66 through '70?
A. Yes, sometime in that period it was discussed.

Q. And did other dairies offer you a private label during [3253] the same period of time? A. Not that I recall.

Q. Was the Tittle business profitable and growing during this period? A. '66 through '70?

Q. Yes, sir. A. Yes.

Q. And the dairy business, the milk and dairy business, it was growing and it was profitable? A. Yes.

Mr. Curnin: No further questions.

Judge Hinkes: Mr. Schaefer.

Cross Examination by Mr. Schaefer:

Q. Mr. Minard, you spoke this morning about you or your store managers or store personnel regularly comparing out-of-store or retail prices of your competitors in the various areas where your stores were located.

Were these comparisons made in writing? A. Yes.

Q. And am I correct in understanding from the subpoena directed to Tittle that for the period 1964 through 1966 that you no longer have copies or have not retained copies of these reports? A. No.

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Testimony of Edward BarneyJuly 27, 1973
• • • • •**【3690】 By Mr. Soeffing:**

Q. Mr. Barney, do you talk with the people who shop in your store from time to time? A. Yes.

Q. And do they talk to you about prices of your competitors, and your own prices? A. At times, yes.

Q. And at times do these include the prices on milk? A. Almost always.

Mr. Schaefer: Does the witness understand the time period that we are talking about, that I would—
Judge Hinkes: Let's be sure.

Mr. Schaefer: At least Complaint Counsel should use the past tense in his questioning.

By Mr. Soeffing:

Q. Have you talked with people during the period 1966 through 1970 on these matters? A. Oh, certainly.

Q. Now, Mr. Barney, thus has it been your experience that the consumers shopping at your stores are generally familiar with milk prices? A. It has been my experience, yes.

Q. Now, you told us—are there any other reasons why milk is important besides the volume of purchases by your consumers, or your customers? **【3691】** A. Well, it just happens, it happens to be in—if I am allowed an opinion, a—probably one of the three or four main items in a supermarket are our dairy products, our meat products, our bakery products. These are things that people shop regularly.

Q. Mr. Barney, what effect would it have on your business if you sold milk at a price higher than that charged

Testimony of Edward Barney

by the large corporate chains? A. We would soon hurt our business terrifically.

Q. Are you familiar with the term "Leader"? A. Yes.

Q. What does it mean to you? A. It could mean one of two things, either the items that we advertise are a noticeably good value when we advertise in the paper, which can be considered a leader, or those items that we have regularly shelfed priced at a price that is a noticeably good value to a customer.

Q. And is milk sometimes used as a leader in the Hammond market area?

Mr. Curnin: Objection, your Honor, getting here with a whole host of hypotheticals. I ask that we determine from this witness what, in fact, happened during this time period.

Judge Hinkes: The question is whether milk was a leader in this area at the time that we are [3692] speaking of. I don't know that we can get any more specific than that—or did you have something else in mind?

Mr. Curnin: That is not—I did not understand that to be the question, your Honor.

May we have the question read?

Judge Hinkes: Let's have the question read back.

(Question read.)

Judge Hinkes: Now the objection once again?

Mr. Curnin: He didn't ask him whether or not milk was used.

Judge Hinkes: Yes, that is about the only suggestion I might make. You might use the past tense to indicate we are still talking of the period '65 to '70.

Mr. Soeffing: No, '66, your Honor.

Testimony of Edward Barney

Judge Hinkes: '66 to '70. Excuse me.

Mr. Soeffing: Yes, sir. Your Honor, I am sorry.

By Mr. Soeffing:

Q. Mr. Barney, was milk sometimes used as a leader your market area in the period 1966 through 1970? A. Yes.

Q. Mr. Barney, were you familiar, in your position with with Model Food Center, Inc.'s, dairy purchasing [3693] practices in the years 1966 through 1970? A. Definitely.

Q. And did your Hammond store purchase from Borden only, or did it purchase from Borden and someone else? A. Borden and Dean.

Q. And approximately how much shelf space was devoted to the Borden product, and how much to the Dean product? A. As near as possible, 50 percent each.

Q. How, sir, if you can describe for us, was Model Food Center, Inc., at least with regard to its Hammond store, billed by Borden? A. Net.

Q. This is in the period June '69 through March of 1970? A. That was billed net.

Mr. Schaefer: Now, your Honor, if we are going to separate out the questions as to '69 and '70, then I object to them insofar as they relate to count three.

My understanding was with respect to questions about the entire period, that only the period up through '68 would relate to count three.

Mr. Soeffing: Your Honor, we understand that.

Judge Hinkes: Well, just for the record, then, let's have it clear that the questions relating to the period '69-'70 are not applicable to count three.

[3694] Mr. Soeffing: It is clear in my mind, your Honor.

Testimony of Edward Barney

Judge Hinkes: Very well.

Mr. Schaefer: Thank you, sir.

By Mr. Soeffing:

Q. Now, you state that you were billed net, and I asked you if you were billed net for the period June, 1969, through March of 1970, to the best of your knowledge. A. To the best of my knowledge that is the way we were billed in respect to the Hammond store.

Q. That is correct. A. Okay.

Q. Now, again with respect—and was that billing on a, on what kind of a basis was that billing? A. Weekly.

Q. It was done weekly.

Now, for the period October, 1966, through March of 1967, how was your Hammond store billed by Borden? A. To the best of my knowledge it was billed on a net basis, plus an allowance for gallons, and specifically gallons, and that doesn't mean gallonage, but gallon, gallon product, gallon milk product.

Q. So you received some kind of an allowance on gallons [3695] only? A. Right.

Q. And on what kind of a basis was that, if you remember it? A. Four cents a gallon, I believe it was.

Q. Now, those—these cents off payments, how often were they paid? A. Monthly.

Q. And when were they paid? A. Oh, product delivered this month would be paid next month, somewhere in the area of the 15th or 18th of the month, or something like that.

Q. So for example, a payment for October would probably be paid sometime in November? A. In November; yes, sir.

Q. During these periods did you also purchase ice cream from Borden? A. Yes.

Q. Mr. Barney, did you ever receive any free equipment

Testimony of Edward Barney

from the Borden company during the years 1966 through 1970? A. Relative to what? We received—we have—we had some equipment relative to ice cream.

Q. In the Hammond store? A. One in each store, as the case may be.

【3696】 Q. Did you receive anything else in connection with milk for your Hammond store? A. No.

Q. The answer is "No"? A. No.

Q. What did you receive, if any, in the way of promotional aid for your Hammond store with regard to milk and dairy products? A. Well, I am not sure I understand the question as to promotional aids. Could be promotional flyers, or this kind of stuff which was available, but which we seldom used, or are you referring to possibly lesser prices on promotional, things that we promoted?

Now, we—we did receive some things, some allowances, promotional allowances on things that were advertised in the paper.

Q. Were these milk and dairy products? A. Dairy products, not milk.

Q. Did you receive these often? A. Assume—relatively every time we advertised a product at a lesser price than our regular shelf price we had some allowances allowed us.

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【3743】 * * *

Q. It's your testimony that you purchased both milk and dairy products from Borden as well as ice cream during this entire period '66 to '70? A. I believe that is correct.

Q. All right.

And that in connection with the ice cream side of it, you received equipment, and also a loan? A. That is correct.

Q. And was that part and parcel of your entire dealing with Borden? In other words, your purchase of milk, dairy products, and ice cream? A. No, sir.

Testimony of Edward Barney

Q. Why not? Was it something separate and distinct?
A. It was separate and distinct for ice cream, period.

Q. But I realize that the equipment and the loan were with relation to ice cream: my question to you, sir, however, is this: Was the receipt of the loan and the receipt of the equipment, and in fact, the receipt of ice cream, part and parcel of your entire dealings with Borden? In other words, the purchase from Borden of milk, dairy products, and ice cream. **【3744】** A. I am not sure I understand what I am supposed to answer to that question.

I—I am not sure what you—what you really expect me to say.

Now, not that you expect me to say anything, but I—

Q. I don't know what you are going to say, Mr. Barney.
A. That is right, but I am not sure I understand exactly what you mean.

Q. In other words, so that the— A. We—we bought milk and ice cream from Borden.

Q. Right. A. And in the process of buying the milk and ice cream we got this equipment and the loan.

Now, other than that I can't—I can't say anything else about it.

Q. All right. A. I can't make something out of it that it isn't.

Q. No, and I don't want you to, and that answers my question. A. Okay.

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【3777】 • • •

Q. In addition to her approving advertising, what did she do? A. (No response.)

Q. Was she involved, for example, in any of the buying side of the business? A. We most often during, for example, during our conversations with any dairy company, we would have sat down together, all three of us.

Testimony of Edward Barney

Q. And how many of those conversations did you have during the period 1966 to 1970? A. Oh, it's hard to say. I listen to anybody that wants to talk to me.

Q. You mean you listen to any dairy that wants to talk to you? A. That's right.

Q. And were you approached frequently by dairies—A. Oh, certainly.

Q. —during this period '66 to '70— A. Yes.

Q. —for your business? A. For our business?

Q. Yes. A. Oh, yes.

Q. And did they offer you prices as good or better [3778] than Borden's? A. Most of the time better, but not, not the type of product that I would like to sell.

Q. And can you identify these dairies for us? A. No, I can't right offhand. They were nondescript, so to speak.

Q. But you would sit down and discuss that with the owners, the fact that you have received an offer from a nondescript company that you were not interested in carrying? A. That's right.

Q. And how many of these conversations about nondescript dairies did you have with the owners? A. I have no idea.

Q. Frequent or infrequent? A. I can't call them frequent because I don't—I don't—I don't have a visit from a new dairy every week.

Q. No. In fact, you had few visits from new dairies? A. I had relatively few, yes.

Q. All right.

One a year? A. Oh, no, no, no. Much more than that.

Q. Twice a year, sir? A. No. Maybe five or six times a year.

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[3795] * * *

Q. Right. A. I can give you an idea, but I can't be specific.

Testimony of Edward Barney

Q. If I should ask you that question for each of the returns in '66—rather, '67, '68, '69 and '70, would your answer be the same, that you cannot tell us how much of that item of expense is allocable to the Hammond store?

A. Not from looking at this, no, I can't.

Q. Were you at any time during the period 1966 to 1970 supplied milk by a supplier other than Borden? A. Yes.

Q. Who was your other supplier during this time period? A. Well, it might have been two, or it could have been just Dean. Dean for sure was one of them, and we might have had Kraml, but I am not sure. I can't recall exactly when Dean replaced Kraml.

Q. It may have been during this period '66 to '70? A. It could have been, but I am not positive.

Q. During the period '66 to '70, you had two suppliers in your Hammond store? A. Right.

Q. And how much of the dairy case did they have, sir, the two suppliers? **【3796】** A. Equal.

Q. Borden had 50 percent and Dean and/or Kraml had 50 percent? A. Correct.

Q. Now, how did the price that you were paying Dean compare to the price that you were paying Borden? A. Lower.

Q. Dean had a lower price? A. Um-hmm.

Q. What? A. Yes.

Q. What about the amount you obtained from Kraml? A. Oh, I can't recall it right offhand. This goes—it might have not even been there at that time. This could conceivably go back ten years.

Q. When you were— A. I am not sure.

Q. When you were being served by Kraml? A. Right.

Q. And did there come a time in 1970 when Dean became your sole supplier? A. In 1970?

Q. In 1970. A. I would say not, because Borden was replaced with Wanzer.

Testimony of Edward Barney

【3797】 Now, there might have been a day or two days or something—

Q. No. Well, let's— A. —like that.

Q. Borden was replaced by Wanzer in 1970? A. Well, whenever it happened. I think it was in 1970, April, or something like that, April 1, or whenever, somewhere in that—I can't recall the specific date.

Q. You identified an A&P store in Munster, Indiana, as having been a store that was in or near your store, and is that the one on Ridge Street? A. Ridge Road.

Q. Ridge Road? A. Um-hum.

Q. How far away is that store from your store, sir? A. Approximately a mile; maybe less.

Q. And I am not sure that I, my notes are correct, but you mentioned another store in that area, Hessville? A. Hessville, yes. After thinking, it's 156th Street in Hessville.

Q. How far away from you is that store? A. Oh, it must be in the area of three miles.

Q. And the Homan Avenue store of A&P is how far away? A. Two miles.

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【3807】 * * *

Q. And to what point in the store was the milk delivered? A. Delivered to our cooler.

Q. Is that a cooler that you could get into from the outside of the store, or did you have to— A. No, you had to come in the store.

Q. Into the store.

And did the driver deposit the milk and the dairy products in the cooler? A. Correct.

Q. And would he rotate the stock in the cooler? A. That was my understanding. Whether he actually did or not, I can't be that certain.

Testimony of Edward Barney

Q. But your understanding is that he did it? A. Um-hum. Could be different.

Q. But it's your understanding that he did, is it not? A. It was our agreement.

Q. All right.

They were supposed to, under your agreement? A. Right.

Q. Did the driver ever place milk and dairy products [3808] into the dairy case? A. That again is something that we had agreed that they would do.

Q. All right.

And he would rotate the stock? A. Now, since I was not actually there, I can't tell you whether he—

Q. You can only tell us on the basis of your understanding— A. That's right.

Q. —and the agreement that you had. A. (Nodding head.)

Q. And would they rotate the stock? A. Supposed to.

Q. Were your stores visited by Borden salesmen? A. Stores?

Q. Stores.

In other words, was your Hammond store visited by the salesman, was your Dolton store visited by the salesman? A. Most of the time any visits from Borden were for me, and they were at my office.

Q. And your office happened to have been— A. Is in Dolton.

Q. —located in Dolton? [3809] A. Right.

Q. But the visit of the salesman would concern Borden's overall dealings with you, including their dealings with you at your Hammond store? A. That's right.

Now, that doesn't say that they did not visit the Hammond store. That I have no way of knowing.

Q. They may have visited the Hammond store as well? A. They could have.

Q. Did you receive point-of-sale advertising, or promo-

Testimony of Edward Barney

tional material from Borden? A. I am sure it was available; whether we actually used it or not, I can't tell you.

Q. Did you ever have demonstrators in your store from Borden? A. Regarding what?

Q. Regarding Borden's milk and dairy products. A. Not to my knowledge.

Q. Did you have any demonstrators in your store in Hammond after it had been remodeled in '68, I believe it was, at the time of its reopening? A. Not to my knowledge.

Q. Did Borden, at that time, supply you with any—what I will refer to as new store opening specials or materials?

【3810】 A. Could very well. Could very well have.

Q. It was their practice—it was the Borden's practice at this time to do so, was it not, sir? A. I believe that's correct.

Q. And did you receive free merchandise from Borden during this period of time? A. Oh, I don't know about that.

Q. What about in connection with the remodeling and re-opening of your Hammond store? A. I don't think that we received anything free. We might have had a special allowance given to us on a certain product, but I don't recall having received free merchandise.

Q. Did you receive an advertising allowance from the Borden Company during this period of time? A. Yes.

Q. And how much was that, sir? A. It varied on the product.

Mr. Soeffing: Now—

By Mr. Curnin:

Q. And did you receive weekly specials from the Borden Company during this period of time? A. Borden put out a, as I can recall, put out a schedule of promotional items—

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Testimony of Edward Barney

【3817】 Q. Did Borden offer you private label milk during this period of time? A. I don't know.

Q. Did Dean Milk Company offer you private label? A. I couldn't tell you that. I really don't know.

Q. Did Wanzer offer you private label? A. Not that I know of.

Q. Did Wanzer seek to get your business during the period '66 to '70? A. Yes.

Q. When did they first seek to get your business? A. It goes back a few years. I can't really recall how long ago.

Q. As early as 1967, sir? A. I would say so.

Q. And did they offer you prices that were comparable to Bordon at that time? A. At least, yes.

Q. And, in fact— A. I would not change for comparable prices.

Q. And in fact they offered you prices that were slightly better than Borden's at this time? A. If, in order to change, they would have to have been better.

Q. And they did make such an offer to you at that time?

【3818】 Q. I would say so.

Q. During the period 1966 to 1970 did you ever see a—withdraw that.

Were you ever told by Borden at any time during the period 1966 to 1970 that you would receive an additional one percent discount if you would assume the risk of spoilage? A. Not to my knowledge.

Q. Were you advised at anytime during the '66 to '70 period by Borden that you would receive an additional one percent discount if you would do the preordering? A. Not to my knowledge.

Q. Were you buying glass and paper from Borden during the period '66 to '70? A. You are talking about gallon product?

Q. Yes, sir. A. Glass and paper?

Q. Glass and paper. A. Chances are, yes.

Testimony of Edward Barney

Q. Is your store open five or six days a week, sir? A. Seven.

Q. And what are its hours? A. In Hammond?

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【3838】 * * *

By Mr. Soeffing:

Q. Did you have personnel which rotated the cases in your store? A. Yes.

Q. Now, you stated that Borden would accept certain spoilage.

How much out-of-date merchandise did the Hammond store have?

Mr. Curnin: If he knows, your Honor.

Mr. Soeffing: If you know.

Judge Hinkes: If you know.

The Witness: Relatively small. I cannot give you a dollar amount.

By Mr. Soeffing:

Q. Now, Mr. Barney, Mr. Curnin questioned you about the fact that Wanzer may have offered you a better price, or made a better offer than Borden. Was this the offer which you finally accepted when you changed to Wanzer? A. Yes.

Q. When was that? A. (No response.)

Q. The approximate year. 【3839】 A. 19—I believe it was in 1970, but I—I can't be all that positive.

Mr. Soeffing: That is the extent of our redirect, your Honor.

Judge Hinkes: Mr. Curnin.

Testimony of Edward Barney

Recross Examination by Mr. Curnin:

Q. The offer, however, of Wanzer was initially made in 1967, was it not, sir? A. I don't know exactly, but it was sometime prior to—

Q. It was several years prior to the actual change? A. Yes, that is definitely true.

Mr. Curnin: Thank you, sir. I have no further questions.

Mr. Schaefer: No questions.

Further Redirect Examination by Mr. Soeffing:

Q. Was this the exact same price offer?

Mr. Curnin: Your Honor, I believe that the witness has already testified as to that question, and if there is any doubt about it, then I ask that complaint counsel's question to this witness be reread, and we have this answer. I think it has been asked and answered.

【3840】 Judge Hinkes: Well, let's reread that. I can't say that I can remember the exact language.

Can you find that, Ernie?

The Reporter: Frankly, your Honor, I really don't know which question and answer he wants.

Judge Hinkes: You are referring to the answer to your question?

Mr. Curnin: No, the answer given to Mr. Soeffing's question.

Judge Hinkes: Let's go back to that.

(Desired portion of record read.)

Mr. Curnin: Asked and answered, your Honor.

Judge Hinkes: Well, I am afraid I can't quite agree with you, Mr. Curnin; when the question says, "Was this the offer," what is the "this"?

Testimony of Edward Barney

I am not so sure that I understand.

Mr. Curnin: Well, read my question and answer to the witness.

Judge Hinkes: Yes.

Mr. Curnin: Then I think it will be clear, your Honor.

(Whereupon, the requested portion of the record was read.)

Mr. Curnin: Let me ask the witness this question, your Honor,—

【3841】 Judge Hinkes: We have reached Mr. Soeffing at this point, and with the state of the record as it is, I see no reason for not clarifying this offer and price, so that we are all sure of what we are talking about.

Instead of leaving it to conjecture as to what the witness may have meant, I am going to allow the question and we will hear the answer.

Will you get the last question of Mr. Soeffing?

(Question read.)

By Mr. Soeffing:

Q. Perhaps I can clarify that for you, Mr. Barney.

You told us that you accepted this Wanzer offer later on. You said something about several years earlier.

Were the prices that were conveyed to you by Wanzer several years earlier the exact same prices that you finally accepted later on in 1970 or '71, or whenever you said it was? A. Not necessarily. They—they could have been different, subject to the time that it happened.

Mr. Soeffing: That is the point I wanted to get across, your Honor.

No further redirect.

Testimony of Edward Barney

【3842】 *Further Recross Examination by Mr. Curnin:*

Q. My question to you, Mr. Barney, is this, that taking the '67 Wanzer offer, was that comparable to the offer which you received and accepted in 1970 in terms of price?

A. Comparable, yes.

Mr. Curnin: Yes. Thank you, sir.

I think that dispels any confusion.

Mr. Soeffing: No further questions from us.

Judge Hinkes: Very well.

Thank you, Mr. Barney. You are excused.

The Witness: Thank you.

(Witness excused.)

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Testimony of Paul Peters

July 27, 1973

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【3847】 Judge Hinkes: You may continue.

Mr. Curnin: Would you read back the last question, please?

(Question read.)

The Witness: My methods don't change.

By Mr. Curnin:

Q. But what about the methods of the Borden driver; did they change, sir, because really, that is what we are talking about, what the Borden driver did, and as separate and apart from the, your method of operation. A. At that time I—I know the driver personally, and the milk was brought right into the cooler.

Q. All right.

Now, when he brought it into the cooler during this period of time, did he rotate the stock when he brought it into the cooler? A. In the cooler, yes.

Q. He did.

And that, he did that both in the October-March period to the June '69-March '70 period? A. This is my method, when any milk man brings milk in, he pulls what is in the far part of the cooler forward—

Q. Right. A.—and puts the new milk in the back.

Q. All right.

【3848】 Now, were there ever occasions during this period of time, for anyone of a variety of reasons, where the driver took some of the milk up to the dairy case?

I am not talking about stocking or anything, but just—
A. Oh, yes.

Q. Now, were there ever occasions during this period, October to March '67, and June '69 to March '70 when the

Testimony of Paul Peters

driver, for reasons of cooperation or otherwise, or maybe because you knew one another, did he ever put milk in the case? A. No.

Q. That did not occur? A. That did not occur.

Q. All right.

But the others did that I have mentioned, rotating the stock and bringing it to the case, but not putting it in the case? A. Yes.

Mr. Curnin: Thank you, sir.

Judge Hinkes: Is there anything else, Mr. Curnin?

Mr. Curnin: No.

Judge Hinkes: Mr. Scheafer?

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Testimony of Robert Barnes

July 30, 1973

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【3861】 * * *

By Mr. Palewicz:

Q. Do you consider discounts or rebates of one or two percent on any product to be important? A. Yes.

Q. Why do you consider them important? A. It's just that much added profit for us that we can make.

Q. Mr. Barnes, how important is milk to your store operation? A. It's one of your leading-leading things.

Judge Hinkes: Try to speak up a little.

The Witness: I'm sorry. It's one of your leading things in the store. People are conscious of milk.

By Mr. Palewicz:

Q. Are there any other reasons besides being one of the leading things in the store why milk is important to your operation? A. As a drawing power, that's all.

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【3867】 * * *

Q. Mr. Barnes, did you receive any loans from the Borden company during either of the periods October, '66 through March, 1967, or June, 1969 through November, 1969? A. Yes.

Q. Did you repay the loan? A. Yes.

Q. Did you pay interest on the loan? A. Yes.

Q. Did you receive any equipment in connection with your purchases of milk and milk products from the Borden company during either of the stated periods? A. No.

Q. During the periods stated, did you receive any promotional aids from Borden? A. Yes.

Testimony of Robert Barnes

Q. And what kind of promotional aids did you receive?
A. Advertisement.

Q. What type of advertisements were these? A. Poster, what have you, shelf talk signs—shelf talkers.

Mr. Curnin: May I have that read back, your Honor?

(Answer read.)

* * * *

【3910】 Q. Did Borden assume the risk of loss if there was any spoilage in their products? A. Yes.

Q. You testified earlier this morning that you did receive advertisements and posters from the Borden company on their milk and dairy products, and then you also referred to self-talk signs.

By that do you mean point of sale display cards and signs and banners? A. Yes, right. Little—the cards for on the dairy case and so forth.

Q. Right. You mount them right on the dairy case. A. Right.

Q. And during the '66-'69 period, were you visited by the Borden sales force, Borden representatives? A. Yes.

Q. And would they review with you any problems that you might be having at that time? A. Yes, if we had any.

Q. And might they also be bringing in some promotional material to drop off with you and—and so that you would have handy in the store? A. If they had something, yes, that we wanted.

Q. In addition to this loan which you received from Borden which made it possible for you to open the store, 【3911】 did you also have an equipment loan with Borden? A. Yes.

Q. And was that for the purchase of an ice cream cooler? A. No, it was a frozen food cooler.

Q. Frozen food cooler.

Testimony of Robert Barnes

And what was the frozen food cooler used for? In other words, what products were in there, sir? A. Any of the frozen foods that were brought in.

It was not an open case. It was a walk-in case in the back room that was used for storing frozen foods and ice cream.

Q. Frozen foods and ice cream? A. If we had any surplus that didn't sit in the counter, we kept it there, yes.

Q. They would go into this walk-in cooler in the back? A. Yes.

Q. And did you obtain this loan from Borden which enabled you to open up the store and this loan on this walk-in cooler all as part of your overall dealings with the Borden company in regard—in addition to these, to your purchase of milk and dairy products? A. They were two different times. The loan was given first, and then a while after we were in, we purchased [3912] the cabinet through them.

Q. Right. But that was all and parcel of your overall dealings with the Borden company? A. Yes.

Q. Did you purchase an ongoing business, sir, or was the business closed at the time you purchased it in July of— A. It was going at the time.

Q. It was an ongoing business? A. Yes.

Q. And what—what dairies were serving the store at that time prior to your purchase? A. There was Dixie and Borden's.

Q. And after you got the loan from Borden and opened up the store, it was all Borden? A. Yes.

Q. And that was part of the understanding or arrangement that you had with the Borden company? A. Well, it was just that we were going to take in their milk, that's all, and ice cream.

Q. Now, you mentioned this Dixie Dairy.

Were other dairies operating in the Hammond area during this period, '66 to '69? A. Yes.

Testimony of Robert Barnes

Q. Can you name them for us? 【3913】 A. I can't name all of them. I know Dixie was operating in there. Now, the other ones, I'm not sure.

Q. Was Dean operating in the area? A. I'm not sure.

Q. What about Wanzer? A. That I'm not sure of, either.

Q. Can you name any of the other dairies who were operating in this area, sir? A. No, sir, I can't, not at that time.

Q. During the period '66 to '69, were you approached by any other dairies in an effort to get you to take on their milk and dairy products? A. Not that I recall, no.

Q. Would that have been something that would have been discussed with you, or would they have contacted, in the main, your father? A. They would have contacted both of us.

Q. And you don't have any recollection of any dairies coming in to see you during that period of time? A. Not that I recall, no.

Q. Were you ever told by Borden that you would receive an extra discount if you accepted the risk of spoilage? A. No.

Q. Were you ever advised by Borden during this period of time that you would receive an extra discount if you 【3914】 did the pre-ordering? A. No.

Q. You mentioned promotional allowances which you received from the Borden company during this period of time.

Did Borden run promotional allowances on dairy products on almost a weekly basis during this period? A. I believe it was pretty close.

Q. And these weekly rebates on dairy items were important in the operation of your business? A. Well, yes, to have a promotional item, yes.

Q. It would help to build traffic in the store? A. Yes.

Testimony of Robert Barnes

Q. Now, during the period 1966 to '69, did the amount of the rebate that you received from the Borden company increase, as best you can recall? A. I thought we had—I thought we had a fairly even keel on our milk. I'm not sure. I'd have to look at the records and find out.

Q. Do you recall during this period of time your asking Borden for an increase in the rebate payment, which they then gave you? A. Could I have the dates on that period?

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【3919】 Q. And can you tell us who, or did they all at various periods of time use it as a leader? A. Yes.

Q. In other words, during the period '66 through '69, at various periods of time A & P on Sohl, National Cash, Burger, Jewel, and Tittle used it as a leader? A. Yes, if they . . .

Q. Thank you—did you want to add— A. If the Burger store was over there at that earlier date, then they—

Q. They used it as a leader? A. Yes, because the other store had the same price, too.

Q. Did A & P's introduction of the sale of private-label milk during the period of '66 through '69 injure your business? A. Not to my knowledge.

Q. Mr. Barnes, you've mentioned this \$40,000 loan from Borden.

Were you paying off that loan throughout the period June of '66 through November of '69? A. Yes, sir.

Mr. Curnin: No further questions, your Honor.

Judge Hinkes: Mr. Schaefer.

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Testimony of James Cox

July 31, 1973

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【3951】 * * *

By Mr. Palewicz:

Q. Why do you consider this important? A. I am lost. I am completely lost. You are going to have to back up.

Q. Do you want me to repeat— A. I would say so.

Mr. Palewicz: Would you read the last question please, and answer.

(Question and answer read, and the pending question was read.)

Mr. Curnin: Your Honor, I believe this is cumulative. The witness has already testified—

Judge Hinkes: No, not yet.

You may answer.

The Witness: Why do I consider it important?

By Mr. Palewicz:

Q. Discounts of one or two percent on any product to be important. A. Well, it's more profit. It pays your bills.

Q. Mr. Cox, how important is milk to your store's operation? A. It was an important factor.

Q. Can you explain that answer, by "an important factor," what do you mean? 【3952】 A. Well, it was a certain amount of our business. Percentage-wise I can't say—probably ten, between ten and fifteen percent.

Q. Mr. Cox, are discounts and rebates on milk and milk products important to your operation? A. Yes.

Q. Why are they important? A. Well, it's based on your volume; the more you sell, the bigger the profit.

Testimony of James Cox

Q. Now, when you say it's based on your volume, the more you sell the bigger the profit, what do you mean? Can you explain that further? A. Well, I would say the larger the rebate.

Q. From the supplier? A. Yes.

Q. During the period 1966, were you familiar with your store's milk and milk products purchasing practices? A. Yes.

Q. Did you do the purchasing during this period? A. Yes.

Q. How were you billed by Borden on milk and milk products during 1966? A. Daily.

Q. Who did you pay? A. The milkman.

【3953】 Q. Was that—by the "milkman," do you mean the driver? A. Yes.

Q. During the period 1966, did you receive any rebate or discounts from Borden off the invoice price of milk and milk products? A. I received a rebate once a month.

Q. You did receive a rebate? A. Yes, once a month.

Q. Once a month.

Do you have any idea how the rebate was calculated? A. It was based on your, the amount of milk you sold. I got 23 percent rebate on everything I sold except if it was a sale item.

Q. And how was the rebate paid to you? A. By check.

Q. When would a rebate for a particular month be paid to you? A. About two weeks, or fifteen or twenty days later.

Q. Would that be after the month, total month's purchases? A. Yes.

Q. Did you receive more than one rebate check per month on milk and milk products from the Borden Company? A. No.

【3954】 Q. Did you also purchase ice cream from Borden? A. Yes.

Testimony of James Cox

Q. Mr. Cox, did you receive, during the period 1966, any loans from the Borden Company? A. No.

Q. Did you receive any equipment during 1966 in connection with your purchases of milk and milk products from the Borden Company? A. Not to my knowledge.

Q. During the period 1966 did you receive any promotional aids from Borden? A. Yes.

Q. And what kind of promotional aids did you receive? A. I would say window signs, which you can feature the merchandise.

Q. And how often did you receive these promotional aids? A. I couldn't tell you, but it was whenever they had a sale.

Q. During the period 1966, Mr. Cox, did you ever receive any promotional allowances? A. Yes, I would say so.

Q. And how were these promotional allowances paid to you? A. They would be taken off the bill.

【3955】 Q. They would be taken off the bill; what do you mean by that, sir? A. Well, if they give you a sale item they would reduce the price off of your invoice.

Q. Mr. Cox, did you pay your Borden bills promptly during the period 1966? A. Yes.

Q. To the best of your knowledge, was your credit rating with the Borden Company good? A. Yes.

Q. To the best of your knowledge were there any added expenses of collection from you? A. No.

Mr. Palewicz: Mark for identification Commission Exhibits 184-M through 184-R, and 184-T through 184-Z, which consists of U.S. individual tax returns for James R. and Ruth S. Cox, for the periods 1966 and 1965, respectively.

(The papers referred to were marked Commission's Exhibits 184-M through 184-R and 184-T through 184-Z for identification.)

Testimony of James Cox

By Mr. Palewicz:

Q. Mr. Cox, I hand these to you and ask you to familiarize yourself with these documents.

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【3994】 * * *

Q. Did the Borden Company regularly promote the sale of dairy products throughout the year? A. I would say yes.

Q. Almost on a weekly basis? A. Not quite that frequently.

Q. Bi-weekly? A. Yes, probably maybe every other week.

Q. And these were important in the operation of your store? A. Yes.

Q. And would you receive promotional aids in connection with those sales, window signs or point-of-sale signs? A. Yes.

Q. You testified that you received no equipment from the Borden Company in 1966.

Had you received equipment from the Borden Company at any time prior to 1966? A. No.

Q. Can you recall for us, sir, what your mark-up was on milk and dairy products in 1966? A. I can't.

Q. Therefore you are unable to tell us how it compares with your mark-up on other items carried in the store? A. There is no way I could, I know.

【3995】 Q. At this time? A. No.

Q. You testified that there were three chains operating in your area in 1966, Jewel, National Tea and A&P? A. (Nodding head.)

Q. How would you rank A&P in the order of competition with these two chains? A. Have to be third.

Q. And who is first? A. Jewel.

Q. And then National Tea? A. Yes.

Q. And then A&P? A. I would say so.

Testimony of James Cox

Q. How does A&P—or did A&P rank with Grocerland?

A. Well, just better known, that's all I could tell you.

Q. But the Grocerland store was a more competitive store? A. Well, it was closer.

Q. Right, and more competitive? A. I would have to say so. It's closer.

Q. Did you, at any time in 1965 or '66, receive offers from other dairies operating in your area to supply you with milk and dairy products? [3996] A. It's possible.

Q. Can you recall for us, sir, the dairies that approached you in 1965 and offered to sell you milk and dairy products? A. I don't imagine I can. I can't tell you the name. I don't know if they would be out there.

Q. Can you recall for us the names of the dairies that contacted you in 1966? A. I can't say for sure.

Q. That is because of the passage of time, you can't now recall what happened in '65 and '66? A. Well, that's right. There is no way I can tell you offhand exactly who come in.

Q. And can you tell us whether or not any of the dairies that contacted you in 1965 offered you a price that was equal or comparable to the price you were then paying the Borden Company? A. I would say it would probably be the same, because I didn't switch milk.

Q. Would the same have been true in, for those dairies that contacted you in 1966? A. Yes, I suppose.

Q. Do you recall now whether or not any of the dairies that contacted you in 1965 or 1966 offered you a better overall price, or a better overall deal than you were [3997] then receiving from the Borden Company? A. I can't say.

Q. What dairies were supplying stores in your area in 1965 and 1966? A. Oh, several.

Q. Will you name them for me, sir? A. Wanzer, Hedlin's, Spinney Run, Hawthorn-Melody, Dean. That's the leaders, I think.

Q. When you say— A. Plus Borden.

Q. Plus Borden? A. Yes.

Testimony of James Cox

Q. When you say Wanzer, Hedlin's, Spinney Run, Dean and Hawthorn-Melldoy were the leaders, do you mean by that sir, that they were popular brands in your area? A. Well, they were in our area.

Q. And to your knowledge were they popular brands of milk? A. I do think so; they are well known.

Q. When you made these price comparisons in 1966, did you maintain any record of these price comparisons? A. No.

Q. Were you ever advised by a Borden representative in 1966 that you could receive a greater discount if you did the pre-ordering? 【3998】 A. I don't recall it.

Q. Do you recall any conversation with the Borden representative at which you were advised that you would receive a greater discount if you assumed the risk of spoilage of milk and dairy products in your store? A. I don't recall.

Q. Did your store have any parking, Mr. Cox, in 1966? A. No.

Q. The Centrella Co-operative, did it offer a milk program to its milk customers? A. If you wanted it.

Q. And would you explain to us what that program was, sir? A. Well, it was just a different company.

Q. What company? A. Dean.

Q. Dean milk? A. I am not even sure that was in 1969 or '66. It could have been later, because I really wasn't interested at the time.

Q. Do you recall any of the terms under which you could purchase Dean milk through the co-operative? A. No.

Q. I believe that you may have covered this already, but was it your testimony that in 1966 you priced your 【3999】 milk and milk products competitively? A. Yes.

Q. You testified that, I believe that there were two A&P stores near you.

Did you compete with both stores, or only one? A. I can't say I competed.

Testimony of James Cox

Q. You can't say you competed with either one of them?
A. I won't say for sure I competed with either one, no.
They were in the area, that's all.

Q. Right.

Did A&P's sale of private label milk and dairy products
in 1966 injure your business? A. They didn't have their
private label.

Q. In 1966? A. I don't think so.

Q. In any event you don't recall their having private
label in 1966? A. No, sir.

Q. Did you have a walk-in cooler or something similar
to that in your store in 1966, Mr. Cox? A. No, sir.

Q. You had a dairy case? A. Yes.

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Testimony of R. John Bitting

August 14, October 24, 1973

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[4242] * * *

Q. Would you turn to your data on the rebate check registers applicable to June 1969? Do you have that, Mr. Bitting? A. I will get it. It is in back of me.

Q. Would you get your check rebate registers for Wilco? A. Yes, sir.

Q. Now, the check register applicable to the June sales by Borden to Wilco is dated July 28, 1969, is that correct? A. That is correct.

Q. The amount of the rebate paid by Borden to Wilco is \$725.14, is that correct? A. That is correct.

Q. Now, for June 1969 did you apply an across-the-board discount to all purchases by Wilco of 8.1 percent?

The figure of \$725.14 that appears on the check register, is that the same figure that appears on the Borden worksheet, Exhibit 288-T for the month of June? A. Yes, sir.

Q. Does that rebate of \$725.14 include a promotional allowance of \$83.33 paid by Borden to Wilco? A. Yes, sir.

Q. Do you know what that promotional allowance was for? A. We made a number of endeavors to define that through **[4243]** various sources, including the Borden officials as well as the Wilco Food Center, and we were not able to determine what the promotional allowance of \$83.33 was applicable to other than the fact it appears on the rebate schedule, rebate worksheets for the milk and dairy products.

Q. Therefore, when you were unable to determine what item or items to which you should allocate the promotional allowance, you allocated it proportionately to all items, is that correct? A. That is correct.

Q. Does the same situation apply, that is the situation which references to the promotional allowance and your

Testimony of R. John Bitting

allocation to the promotional allowance, apply to the months of July, August, September, October, November, and December of 1966? A. It applies to 1969.

Q. I am sorry, 1969. A. Yes, sir.

Q. It does? A. Yes, sir.

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【4868】 The Witness: The dollar sales figure on CX-183, Your Honor, does represent the total dollar figure on a daily basis from the price put for a particular customer. The price book does not set out the unit price for each particular product. It sets out the quantity and then a dollar figure for that day's purchases.

Judge Hinkes: Well, what I want to know is whether the cost to these stores that you used in making comparisons reflect what the store actually paid or whether they reflect the item multiplied by its list price?

The Witness: It reflects the price shown in the appropriate page of the price book on a daily basis for the items purchased, and then the CX-183 also reflects the amount of the rebate memoranda where those did appear for a particular customer.

Judge Hinkes: Forgetting the rebate memoranda for a moment, all I am interested in knowing is whether that price is a calculated price using list price or whether it is the actual price charged to the store before the rebate memoranda were applied.

The Witness: It is the price the driver computed at the time of the delivery and recorded it in his route book for the entire day's purchases.

Judge Hinkes: What price did the driver use; do you know?

【4869】 The Witness: We don't know.

Testimony of R. John Bitting

Judge Hinkes: Then do you know whether or not the promotional allowances were included in the price that the driver used?

The Witness: Not from the price book information.

Judge Hinkes: Well, do you know it from any stores?

The Witness: On the testimony of Mr. Lasorso on which Mr. Shaffer just read indicates that the case of a promotional allowance that the driver would consider that in arriving at his total billing for that day's delivery as recorded in the CX-183.

Mr. Shaffer: May I just interject with one question at this point, Your Honor, because I do not think that there is any way to tell—let me ask you.

By Mr. Shaffer:

Q. Is there any way to tell whether in preparing the invoice for the store the driver took the figure shown in this book, the route book, entered that on the invoice, and subtracted off either special pricings or discounts of one manner or the other with respect to charge customers we have testimony would treat it in a different way, or whether in the alternative the driver took the special price into account in reaching the total which he reaches? A. We have no way of determining whether it was taken off after the driver totaled up the day's purchases or figured **4870** in a net price before he got to that total for a particular product, subject to the promotional allowance if there was one.

Q. That is right.

Now, as I understand your testimony with respect to Commission Exhibit 183, if the driver took off a promotional allowance before he totaled the figure; in other words, if his total is the net after the promotional allow-

Testimony of R. John Bitting

ance, then the dollar amount of sales figure on Commission Exhibit 183 would be something other than the list price for that customer, is that correct? A. It very well could be. Received a promotional allowance.

Q. Right.

On the other hand, if the route book figure reflects the list price for these items, if a particular driver entered the list price for the particular items and then on the invoice which he delivered to the store subtracted the promotional allowance or any other discount, that information would not be taken into account anywhere in either Commission Exhibit 183 or the underlying documents, is that correct? A. I believe that is correct. Mr. Rouse when he submitted these route books to us on November, 1970, testified that they were the records of the accounts receivable between Borden and the customer.

Q. Well, I am not sure that was Mr. Rouse's testimony, [4871] Mr. Bitting. In fact, I think there is testimony in the record that indicates that these books were kept in different ways. I think Mr. Rouse was very careful to point out at the subpoena return and before his testimony before the Commission that there were discounts that were taken off the invoices.

Now, you may be relying on part of his testimony, but the other part of it is the problem we are trying to focus on here.

Now, in distinction to the process which we have just talked about of using the total dollar figure representing the full product line reflected in these books, when you prepared the information shown for A&P on Commission Exhibit 183 is it correct that you took each of the 11 products we are considering, took A&P's invoice price for those products, and extended that price to determine the price actually paid by A&P? A. That's the procedure, yes.

Q. What were the 11 products included in A&P's pur-

Testimony of R. John Bitting

chases on Commission's 183-C, Mr. Bitting? A. The 11 products consisted of the Homogenized Milk in the gallon, one-half gallon and the quart containers; 2 Percent in the one-half gallon container; Skim Milk in the quart and one-half gallon containers; Buttermilk in the one-half gallon and quart containers; Chocolate in the quart container; the whipping cream in the one-half pint container; and the Half and Half in * * *

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Testimony of Scott Walker

November 1, 1973

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【5461】 * * *

Now I have asked you to please tell us what these facts are and what bearing they have on such butterfat content. A. First, the fact in the bid that the Bowman and A & P label was being offered at the same price or cost to A & P. Second, Mr. Schmidt testified that he did not ask for any specific butterfat content for the homogenized milk beyond the legal requirement. Third, in the Chicago area, in the city of Chicago, the minimum butterfat requirement is 3.25 percent. And fourth, in reviewing the handlers reports for Bowman and for Borden for the period of January, 1965 through March of 1966, I discovered that the butterfat test of the milk processed by Bowman and submitted to the Milk Market Administrator indicated a lower butterfat test than that on the Borden handlers reports. It is therefore my conclusion that had Bowman received the bid the butterfat content in the milk supplied by the Bowman Company would have had a lower butterfat content than that actually supplied by the Borden Company.

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Testimony of Joseph J. Pergler
March 11, 1974

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【5629】 * * *

Q. Did you have any responsibilities or duties with reference to the A&P private label program at the O'Hare branch? A. Yes, I did.

Q. What were your responsibilities and duties with reference to A&P's private label program? A. My duties and responsibilities were to rearrange our routes to a point where we could service A&P stores at the time they needed the service and demanded the service.

Q. Were you responsible for the delivery to A&P of its product? A. Yes.

Q. Did you have any responsibility for delivery and service to the other customers served by the Borden O'Hare branch? A. Yes, I did.

Q. Now, did you have any responsibility with respect to the prices to be charged the non-A&P customers served by the O'Hare branch? A. Yes.

Q. What was your responsibility to prices? A. Well, my responsibility there, of course, was to enforce the price list that we had from Borden, our published price list, and in cases where we had competitive problems we met competition at times.

Q. You say you met competition. Do you mean by that that you 【5630】 departed from the Borden discount schedule? A. The regular discount schedule.

Q. Did you do that under your own authority? A. Yes.

Q. Will you describe the operation of the O'Hare branch and details of its delivery and pricing program? A. At the O'Hare branch—would you repeat that question, sir?

Q. Will you describe the method of operation of the O'Hare branch with particular emphasis on the details of the delivery program? A. As far as the delivery program is concerned, we, of course, had to make certain that our customers received regular and prompt deliveries as close

Testimony of Joseph J. Pergler

to a schedule as we possibly could maintain and make adjustments in our delivery schedule as needed.

I am not sure I understood your question.

Q. Perhaps I can ask you some more detailed questions.

Will you describe the physical layout of the O'Hare branch of the Borden Company? A. Yes. To begin with, we had a cooler, the approximate size being 135 feet by 50 or 60 feet in width, which had four entrances and exits to it, one in each direction, north, south, east and west, and the front part of the building we had reserve stalls for six trailers that came in with milk from our Woodstock plant.

【5631】 All the milk was delivered to us on pallets. We used fork trucks to unload the trailers and put the milk in our cooler with exceptions being toward the end of the period when we were expecting trucks from Woodstock, we would unload the trailers directly into the route trucks.

Then when our loaders were loading the trucks, they would take the milk on pallets again from the cooler directly onto the trucks.

Q. What type of routes were operated out of the O'Hare branch? A. Well, we had company-operated routes that we termed store routes and bulk routes, bulk being where they served restaurants, institutions and hotels, et cetera, that type of business on the bulk routes.

Then we also had independent vendors and distributors.

Q. What is an independent vendor or distributor? A. An independent vendor is a man who operated his own truck, his own route, it was his own business. A distributor is another name for a vendor that had more than one route.

Q. You say operated his own business. You mean he bought the milk from the Borden Company and sold it to whomever he could? A. That is correct.

Q. Were there such sales known as counter-sales at the O'Hare branch? A. Yes, there was. Now explaining

Testimony of Joseph J. Pergler

counter-sales, this is [5632] where someone came to our location to purchase milk. It could have been quart milk or in larger quantities, where they paid cash for it.

Now another type of counter-sale that we had was sales to the Navy, for instance, at Great Lakes. The Woodstock plant made the deliveries direct to Great Lakes Training Station via trailers, but they being a processing plant, they had no way of handling the sales of the product to Great Lakes. So we treated that as a so-called counter-sale.

Q. That particular delivery from Woodstock to the Naval station would not have physically gone through the O'Hare branch? A. No, at no time.

Q. Would you describe what a pallet is, Mr. Pergler? A. The best description I can give of a pallet, it is a wooden platform approximately four and a half by five feet in size, and about eight inches high with a supporting board in the center of it, allowing a fork truck to enter between the center board and the two sides and lift it up and carry it to whatever designation we wanted it.

Q. I take it the cases of milk and milk products are stored on the pallet. A. Yes, that is the way we receive it from our Woodstock plant.

Q. How many cases, if you know, are on a pallet? A. There were 30 cases with the exception of gallons of milk which were in glass, there would be 36 cases then.

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[5639] *By Mr. Foley:*

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Q. Now after the Tripp Avenue plant was closed down at the end of 1963 and the O'Hare branch was opened at the beginning of 1964, how many store routes did Borden Company operate out of the O'Hare branch? A. Twenty.

Q. So it went from 26 to 20? A. Twenty.

Q. Was there any further reduction after the beginning

Testimony of Joseph J. Pergler

of the opening of the O'Hare branch? A. When we first moved to—yes, we reduced it finally to 13.

Q. Will you describe what happened and at what stages it went from 26 to 13 and, if you know, what were the reasons for the reduction in store routes? A. Number one, when we closed the Tripp Avenue plant we made a consolidation of some of our routes to reduce that number from 26 to 20. So when we moved into O'Hare we had 20 company store routes. After we went into the private label program with A&P it afforded us an opportunity to reduce the number from 20 to 13 by this private label program that we entered into with A&P.

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【5647】 * * *

Q. How many doors were there on the Borden delivery truck? A. Two. One side door and rear doors.

Q. Was it the idea of the program to load the truck in such a manner as to get the product off the truck as fast as possible? A. Yes.

Mr. Mathias: Your Honor, I am going to object to the leading of the witness again, such as "Was it the idea of the program . . ."

Mr. Foley: I withdraw the question.

Judge Hinkes: Very well.

By Mr. Foley:

Q. Mr. Pergler, you have given us some of the details of the private label program from Borden to A&P. Are you familiar with the details of the services which were provided to A&P under the private label program? A. I am not quite sure I understand your question, Mr. Foley.

Q. Do you know what services Borden was to provide to A&P under the private label program that was in effect after November 1965? A. Yes.

Testimony of Joseph J. Pergler

Q. Would you describe the terms and conditions of the private label program. A. Number one, by getting into the private label program **【5648】** we had what we termed the drop delivery. Our man just delivered the milk into the back room or their cooler. He did not stack the dairy case. As stated previously, they had to have the next day's order ready for our man so that he would know what their needs would be. They also had to have all the empty cases ready for him at the back door, stacked neatly enough for him to remove from their premises in an orderly fashion.

There were to be no special deliveries and also we were not taking out any outdated merchandise from the A&P stores. The only thing we ever gave them credit for were containers of product that was directly our fault.

【5649】 Q. Mr. Pergler, was there any practice under the private label program with reference to A&P's ordering of split cases or full cases of a product? A. Well, we insisted upon them ordering their major items such as quarts, half-gallons and gallons of milk and pints of half-and-half in full cases. The minor products such as quarts of chocolate, quarts of buttermilk, sour cream, that they could order in less than case quantities.

Q. What did the A&P store manager, whoever it was, from A&P that gave the Borden order, on what kind of document did you give this order? A. It was what we termed a chainstore ticket. It was a delivery ticket as well as an order ticket. It served a dual purpose.

Q. Was there a separate delivery ticket for private label purchases and for Borden label purchases to each of the A&P stores? A. No, this was one complete ticket. It had both private label and Borden product listed on it.

Q. How did A&P and its stores comply with the terms and conditions of the private label program?

Mr. Mathias: Your Honor, I am going to object unless there is some foundation laid for the question.

Testimony of Joseph J. Pergler

Mr. Foley: I think the witness has testified he was the man responsible for the delivery system, he supervised the [5650] operation of the deliverymen, he was responsible for all the operations of the O'Hare Branch.

Mr. Mathias: There has been no testimony he participated in any of the deliveries.

Judge Hinkes: Perhaps your question should be limited to his instructions on delivery inasmuch as we have nothing to indicate that his instructions were followed. Perhaps they were different from his instruction.

By Mr. Foley:

Q. Mr. Pergler, did you give instructions on delivery to the Borden drivers? A. Yes, I did.

Q. What instructions did you give them? A. I outlined to them the terms of the private label program we had with A&P and I had asked them to report directly to me in the event that there was any lack of compliance on the part of A&P store personnel.

Q. Did you receive reports from your drivers? A. Yes. I did and they were all very satisfactory. They had a hundred percent cooperation from the store personnel.

Q. Now you previously mentioned the pallet system of delivery from Woodstock. Was this the same type of delivery system that was effected at Trip Avenue? A. No, it wasn't. At Trip Avenue we had the bottling plant in conjunction with the branch. Our type of loading there was [5651] manual. In other words, we loaded the trucks manually by dragging off of a platform into the truck five cases of milk at one time. This is the reason why we used as many men in loading and unloading at Trip Avenue versus what we used at O'Hare Branch. It was the manual operation versus the pallet-type operation.

Testimony of Joseph J. Pergler

Q. Mr. Pergler, once again just to clear up a point, do counter sales include sales to Borden vendors? A. No.

Q. Now were you familiar with the expenditures of Borden's O'Hare Branch? A. Yes.

Q. And in particular were you familiar with the petty cash disbursement made out of the O'Hare Branch? A. Yes.

Q. Can you tell us, Mr. Pergler, were any of the petty cash disbursements at the O'Hare Branch used for the service of A&P? A. No, they were not.

Q. What type of service was being received by the non-A&P customers of Borden on the O'Hare Branch? A. Well, the non-A&P customers received what we would term a full service-type delivery. This entailed our man putting into the store the amount of merchandise he thought they would need. He stocked their dairy case. He would remove all outdated merchandise and give them credit and then he would collect, as a [5652] rule, cash daily on his deliveries.

Q. Who would make out the order? A. Our man would make it out, sir. Our man did everything at the store. The storekeeper did nothing.

Q. Would the Borden driver in delivering to the non-A&P customers make entry in his route book as to the quantity of product delivered? A. Yes, he would. Each day he would enter into the route book the amount of merchandise he had left and the amount of monies he had collected or the amount of monies that were charged that particular day.

Q. Were route book entries to be made by Borden's drivers to the A&P stores? A. No, there was no need for that once we got into the private label.

Q. Why was there no reason for that once you got into the private label? A. For the simple reason that there was no money changed hands and the store tickets were computed at our Kilborne Avenue location.

Testimony of Joseph J. Pergler

Q. What is the Kilborne Avenue location? A. That was our general office, district office.

Q. So the drivers did not collect any payment from A&P stores? A. None whatever. The billing to A&P was done from our Kilborne location.

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【5664】 By Mr. Foley:

Q. When was it that you enjoyed this authority, Mr. Pergler, to vary the discounts? A. We are talking about the O'Hare branch. From 1963 to the time of my retirement.

Q. During your entire tenure there? A. Right.

Q. Now I direct your attention to Floom Bros., Mr. Pergler. I ask you whether Floom Bros. received the published discount or whether it received some other discount. A. They received some other discounts, sir.

Q. What discount was that? A. They were members of Consolidated Foods. They would receive at least two percent more than what they would earn.

Q. When you say "greater than what they would earn," you mean greater than what they would earn under the published discount schedule? A. Yes, sir.

Q. Directing your attention to Greenview Fruit, are you aware of what discount Greenview received? A. Yes, they would also receive more discount than what they would earn. They were also a member of Consolidated.

Q. Now with reference to this one other customer for whom no discount was given, and that is Madison La Veigne, at the top of the second page, 183B, do you know what discount Madison 【5665】 La Veigne received? A. Yes, they received more than what they would actually earn on their own.

Q. Did Borden sell its dairy products to its customers in Chicago out of the O'Hare branch in accord with the published discount schedule in February and March 1966.

Testimony of Joseph J. Pergler

Mr. Pergler? A. Would you repeat that question again, sir?

Q. Did Borden sell its milk and dairy products to its non-A&P customers in Chicago out of the O'Hare branch in accordance with its published discount schedule? A. Yes.

Q. You have just given us three or four cases where the Borden Company granted a higher discount rebate. A. Yes.

Q. Were there any other customers who received higher discounts? A. Yes, that are not on this list.

Q. Even on the customers on this list—

Mr. Mathias: Your Honor, is Mr. Foley trying now to impeach his own witness?

Mr. Foley: I am not.

Judge Hinkes: Well, in any event, I will let you continue, Mr. Foley.

By Mr. Foley:

Q. Previously, Mr. Pergler, you made reference to your authority [5666] to change the discount schedule for customers. When did you have occasion to do that? A. Well, I changed them at times when we had a competitive situation where some of our competitors went into our customers and offered greater discount. In order to retain the business, I met the offer that was made to them.

Q. Did this happen very often in 1966? A. It was quite frequent, I would say. In all cases, however, we did not give any additional discounts.

Q. Only sometimes you gave additional discounts? A. Only sometimes.

Q. How did you know that your competitors were offering higher discounts than you were? A. Usually our store keepers would notify us that they had been there and what they had been offered and told us if we wanted to main-

Testimony of Joseph J. Pergler

tain the business, we would have to meet it or come as close to it as possible.

Q. Now, Mr. Pergler, once again directing your attention to Commission Exhibit 183 and calling your attention to Bill's Market—Bill's Market appears on 193A at the location of 6649 North Clark Street—it is near the bottom of the page—do you see that? A. I see it.

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【5690】 Mr. Foley: I recall on Mr. Mathias' objection Your Honor previously ruled we were not to pursue the question after Your Honor ruled on it.

Judge Hinkes: This is a new objection. I will overrule the objection in any event. I think it is the type of hearsay which could be allowed in this proceeding.

You may answer what did you learn.

The Witness: I learned there was deviation on the part of other dairies from the published lists and discount lists.

By Mr. Foley:

Q. How common a practice was this? A. It was quite common in the market. It was quite common in the market, to answer your question.

Mr. Foley: I have no other questions.

Judge Hinkes: Do you have any questions, Mr. Schaefer?

Mr. Schaefer: No, Your Honor. This whole subject, as I understand, relates to counts 1 and 2, so we have no questions.

Judge Hinkes: Very well. You may cross-examine.

Mr. Mathias: Your Honor, could we have a five-minute recess to put our notes together?

Testimony of Joseph J. Pergler

Judge Hinkes: Very well, we will take a short recess now.

(Whereupon, a brief recess was taken.)

Judge Hinkes: Mr. Mathias, you may cross-examine.

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【5693】 * * *

Q. During the time Mr. Gose was there would Mr. Hedin or Mr. Sorensen report to him? A. Yes, sir.

Q. Now, Mr. Pergler, you stated that you gave instructions to the route men in the O'Hare Branch in connection with the A&P private label program. Were those written instructions, sir? A. They were verbal.

Q. And the reports which you received back from the route men, were these in written or verbal form? A. Verbal form.

Q. Mr. Pergler, you were asked a number of questions concerning counter sales. I think you defined them approximately as sales to someone who came to the O'Hare Branch location to purchase milk; is that correct, sir? A. That is part of it, yes.

Q. You also mentioned sales to the Navy, at the Great Lakes Station? A. That is correct, sir.

Q. What proportion of your counter sales were accounted for by the sales to the Navy at Great Lakes? A. About 99.5 percent, or 99.8 percent, sir. The counter sales to people coming to the location to purchase milk were just about nil.

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【5727】 appearing in the published discount schedules of Borden that there is also a two percent discount available for central billing to groups. Is this correct, sir? A. That is correct.

Q. Is this the two percent to which you referred in connection with Flook Brothers? A. Yes, sir.

Testimony of Joseph J. Pergler

Q. Would this be the additional discount also mentioned in connection with the other three, Misicka, Greenview—
A. No, Misicka was different.

Q. Was Misicka a member of any group? A. Consolidated.

Q. He was a member of the Consolidated group? A. Yes.

Q. Did he receive two percent for central billing? A. Yes, sir.

Q. What about Greenview Fruit, were they a member of Consolidated? A. I am a little hazy whether it was Consolidated or Grocerland. In all probability it was Consolidated.

Q. They were a member of a buying group? A. Yes, either Grocerland or Consolidated.

Q. They would receive two percent discount for central billing as well? A. Yes, sir.

【5728】 Q. In the case of Madison LaVeigne, was this store a member or any cooperative group? A. Yes.

Q. What cooperative group, if you can recall? A. I think it was Consolidated.

Q. Would they also have received a 2 percent additional discount for central billing? A. Yes, sir.

Q. Now, you say that Misicka was different from Floom Brothers. What did you mean by that, sir? A. We had a competitive situation there where some competitor went in there and offered him a larger discount. In order to retain the business we had to meet that discount.

Q. In the case of Greenview Fruit, what was the circumstance there? Was it a competitive discount as well, or was that the 2 percent central billing? A. To the best of my recollection, he got the two percent central billing.

Q. And Madison LaVeigne? A. That likewise was the same situation.

Q. The 2 percent additional? A. To the best of my recollection, sir.

Testimony of Joseph J. Pergler

Q. Now, Mr. Pergler, you were asked some questions about the published prices and discount schedule of Borden's competitors. You stated that you were aware that some of your [5729] major competitors, such as Bowman, Dean and Wanzer, and you may have mentioned some others, did have some published schedules. You were also asked if these competitors adhered to the published schedules.

Did you learn from your customers that there was deviation from these published schedules? A. Yes, sir.

Q. Now, Mr. Pergler, you would only be likely to hear of any deviations from the schedules, is that not correct? A. Yes.

Q. In other words, your customers would not be calling it to your attention when they were only offered the regular published list price plus published discount schedule, is that correct, sir? A. Well, they would let us know that our competitors had been in there making a solicitation even though it might have been at their published discount prices.

Q. Unless those published prices varied quite differently from Borden they would not call them to your attention, sir? A. No.

Q. Were there some occasions when a competitor would come out with a new discount schedule which appeared to offer a little better price than Borden and this was called to your attention? A. Yes, sir. I may be leaving a wrong impression here in

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[5743] * * *

Q. How successful were you in 1966 on the O'Hare route in getting paid from the customers in accordance with the published discount schedule and published price list? A. To the best of my recollection I would say with the exceptions of those cases where competitors had been in offering inducements we were quite successful.

Testimony of Joseph J. Pergler

Q. Of the customers listed on CX-183, for example, if you will look that over, do you have any idea how many of them received only that to which they were entitled under the published discount with the possible two percent extra if they were getting the central billing feature? A. I think all of them except two would receive something additional.

Q. All of these customers would receive something additional? A. Right.

Judge Hinkes: That is additional beyond the two percent for central billing?

The Witness: Beyond our published discount price.

Judge Hinkes: The question combined both, your published discounts and the two percent central billing. Did [5744] they get more than that?

The Witness: Yes.

Judge Hinkes: All of them?

The Witness: All except two to the best of my recollection, sir.

By Mr. Foley:

Q. Was this in response to competitive conditions? A. Yes, sir.

Mr. Foley: May I see W-13, Mr. Mathias?
Do you have W-13 for March? I guess that is it.

By Mr. Foley:

Q. Mr. Pergler, directing your attention to Route Book W-13 for March 1966 and the pink slip in the front of that book entitled "Office charges for special orders," are you familiar with that form, sir? A. Yes.

Q. What is that special order form used for? A. This is for a special delivery to a customer.

Testimony of Joseph J. Pergler

Q. When you see this slip here does this indicate to you that the A&P Store identified there at 1227 Harlan Avenue received a special delivery on that date? A. Yes, sir.

Q. Would you have any explanation as to why that should have taken place under the private label program? A. Yes. So I may clarify some misunderstanding here, I want **【5745】** to say when the program went into effect, gentlemen, we conscientiously tried to enforce all the terms of the agreement between A&P and the Borden Company relative to the private label program. However, to break a habit of years standing with some of the men took time and patience to correct. Eventually we corrected all these inequalities, so to speak, where the men were keeping records in the book where they weren't supposed to. They had to be constantly corrected in that respect. The same with specials.

Now, the special deliveries came about in two ways. This we corrected almost instantly. It is quite possible that our man was shorted on his load by the loaders, where he did not get his full load. It is possible that our man made an error in computing the order for the day on particularly the Borden label product which in this case indicates that he had a special for Borden. Or when our man was serving some of the independent stores prior to getting to A&P he had received orders from the independent stores which were in excess of what he anticipated the needs would be. So as a result, when he got to the A&P Store he found he was short of merchandise and asked that special delivery be made.

Judge Hinkes: You say all this is possible, but do you know what happened here?

The Witness: Sir, on this particular case, no.

Judge Hinkes: Very well, you may go on, Mr. Foley.

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Testimony of Samuel E. Dean

March 13, 1974

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【5959】 * * *

Q. To your knowledge, did these competitors of Dean deviate from the published price and discount schedules in an effort to obtain business? A. Why they deviated, I would only be assuming, Mr. Counsel. It might have been to accomplish the purpose you are talking about. It might have been because a competitive price was offered from somewhere else that required them to deviate from it.

Q. But they did deviate from the published discount schedule? A. Yes.

Q. Was that true of the Borden Company during this period of time? A. Yes.

Q. Can you tell us, Mr. Dean, who is the first to introduce private label milk in the Chicago market? A. I take it when you say private label, you mean a house controlled brand and not simply an unnamed brand?

Q. Yes, that is correct. A. The first one we can recall, or I can recall, in Chicago, is one we managed for Jewel Food stores under the name of Yummy. This was in the early 1950's.

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【5966】 Q. Was that in all sizes or just one size? Was it in the quart, half gallon, gallon? A. My recollection is it was in the quarts and half gallons.

Q. To go back to the 1950's, when this was first introduced, what was the wholesale cost differential between the Yummy label and the Dean label?

Mr. Curnin: Objection, Your Honor. Far beyond the scope of the direct examination.

Judge Hinkes: I don't think this witness was questioned about any costs as such.

Testimony of Samuel E. Dean

Mr. Mathias: He was questioned about the costing of Jewel of this product and I think this opens up the door—it is relevant for a full inquiry to find out what the cost differential was to Jewel.

Judge Hinkes: It may be relevant but with the ground rules that have been laid, I must insist that the cross examination be limited to the area of the direct examination and I will have to sustain the objection.

By Mr. Mathias:

Q. Mr. Dean, you were asked some questions concerning Dean's sales to Centrella stores and Grocerland stores and the number of stores that were involved in your sales to these 2 voluntary groups. In the case of Centrella stores, did Dean serve many Centrella stores? **【5967】** A. No.

Q. And in the case of Grocerland, did Dean serve all Grocerland stores? A. We served all of the bigger ones. We couldn't afford to serve the small ones.

Q. You did not serve the entire voluntary group? A. No.

Q. Now, Mr. Dean, you were asked some questions concerning your familiarity with Borden's pricing policies and their discounting policies. How would you become acquainted with the pricing practices of the Borden Company?

Mr. Curnin: May I have that question read back?

Judge Hinkes: Would you read back the question? (The pending question was read by the reporter.)

Mr. Curnin: I would object to that question, Your Honor. Familiarity with Borden's pricing policies—I think it is so broad it may be incapable of being answered, but in any event, my question was limited

Testimony of Samuel E. Dean

to Borden's use by Borden of a published discount schedule, deviations from a discount schedule. I did not go through the general range of Borden's pricing policies.

Judge Hinkes: That is correct. I think you will have to limit yourself to that particular subject matter. I think that pricing policies covers a very much greater area than simply published prices and deviations therefrom.

【5968】 Mr. Mathias: Well, by—strike that.

By Mr. Mathias:

Q. Mr. Dean, how would you become aware of deviations by Borden from their published discount schedules? A. We might both serve some Centrelle stores, for instance. The minute you get into that position, everything you put out goes to your competition, if they are serving other ones than what they put out ultimately is made available to you, not by Borden, but the customers that receive them.

Q. If a customer receives an offer from Borden, that customer would report it to Dean? A. If it was more advantageous than the price he was getting from us, yes.

Q. Would this always be a deviation from Borden's published discount schedule or might it be Borden's published discount schedule? A. It could be either.

Q. Mr. Dean, you mentioned the experience of Jewel in the 1950's when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?

Mr. Curnin: Objection, Your Honor. One is to
【5969】 foundation. Two, it is beyond the scope of direct. He was asked only about Jewel's retail

Testimony of Samuel E. Dean

pricing at the time of the introduction of private label in the early 1950's.

Mr. Mathias: I think I should be able to explore whether or not Dean, at any other time in the course of the time period covered by Mr. Curnin's direct, reduced the price on private label.

Mr. Curnin: Dean or Jewel?

Mr. Mathias: I mean Jewel—excuse me.

Judge Hinkes: I think this is sufficiently tied in to what this witness has already spoken about and I think I should allow it.

Mr. Curnin: May we establish foundation?

By Mr. Mathias:

Q. Do you recall the question or would you like to have it read back? A. I would like to have it read back.

Q. Would the reporter please read the question back to Mr. Dean?

(The pending question was read by the reporter, as follows:

"Mr. Dean, you mentioned the experience of Jewel in the 1950's, when it reduced the price on Yummy and created a differential between Yummy and the Dean brand. After Jewel opened its own dairy and started producing its [5970] own milk and selling its own milk in its stores, do you recall whether, at any time, it reduced the price on milk?"

The Witness: As of this moment, I don't recall any on milk as milk.

By Mr. Mathias:

Q. Mr. Dean, during this period of time which you are being questioned, particularly between 1965 and 1970, did Dean attempt, in its sales to its various customers, to

Testimony of Samuel E. Dean

adhere to its published price lists and discount schedules?

A. Yes. That was the purpose in putting them out.

Q. Now, Mr. Dean, you mentioned that Dean sold primarily through retail grocery stores—wholesale to retail grocery stores, and where you did acquire retail business or bulk institutional business, you attempted to get rid of it as soon as possible. Now, is the Chicago area, does Dean sell to schools? A. No.

Q. To restaurant chains? A. No.

Q. To airlines? A. Not as part of the company's sales program. We have distributors who may sell to schools, I don't know. We wouldn't know of them. They may sell to airlines, we wouldn't know of them. We do not, as part of our own company operation service that type of an outlet.

【5971】 Q. No further cross, Your Honor.

Mr. Curnin: One question, Your Honor.

Redirect Examination by Mr. Curnin:

Q. Did the Dean Company deviate from its published price and discount schedule during the period 1965 to 1970?

A. Yes.

Q. No further questions.

Judge Hinkes: Anything else; Mr. White?

Mr. White: No questions.

Judge Hinkes: Thank you. You may step down.

(Witness excused).

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Testimony of Frank T. Cannon

March 15, 1974

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【6125】 By Mr. McInerney:

Q. Approximately when was that? A. I am guessing, the month of July sometime in the year 1965.

Judge Hinkes: Now is that Elmer Smith or Schmidt?

The Witness: Elmer Schmidt.

By Mr. McInerney:

Q. Would you give us the substance of that conversation, please? A. As best I recall, there was very little conversation on the telephone other than he wanted me to come over and discuss with him the possibility of our making a bid for all of their fluid milk business.

Knowing Elmer as well as I did, I am sure there was some small talk, but I did visit him in the next day or two, maybe that very day, I don't recall exactly.

Q. Tell us, please, what he said to you and what you said to him on the occasion of that visit. A. Well, on that first visit—I might add I discussed it with my superiors first, who I reported to was the president of the company, and we were trying to protect ourselves from the fact it might be a fishing expedition, as we called it, just to find out what the pricing level was in the market. I went in with that not maybe as objective a look as I should have.

I went in and discussed it with him and went over the long time it took to make a quotation. He said he wanted it in **【6126】** detail. I told him it would take some time to do this and I was hopeful he was serious about it, and he assured me he was, that this was open for bid and others would be asked to bid also, meaning others than the Borden Company. They were going to be asked also, as I

Testimony of Frank T. Cannon

understood it. That is the best recollection I have of that first visit.

I beg your pardon, there was one thing he was very emphatic about because it happened on occasion where people made bids and couldn't live with it; he wanted to make sure we had some profit in the bid for ourselves.

Q. Did he tell you why he wanted to be sure? A. This was the Tea Company policy as far as I knew.

Q. Where was this conversation? A. This was in the Tea Company offices on Pulaski Road in Chicago.

Q. Did Mr. Schmidt have an office there? A. No, sir, he did not have an office. He sat out at a desk very similar to one of these desks you see down in front of us here, and right next to him on the other side was his secretary and on down the line from him were rows of buyers sitting at desks the same way.

Q. Now in the course of that conversation did Mr. Schmidt tell you how many stores were to be served? A. He gave me a list of the stores. I just don't recall the number but they are in the exhibit here. He gave me the total **【6127】** list of stores that we were to bid on in Indiana, Iowa, and Illinois and Southern Wisconsin, too—I think there are some in Southern Wisconsin in that quotation.

That is the only specifications or the only information he gave us to work on, that these are the stores, you bid on them.

Q. You mentioned—just to make sure, maybe I'd better ask the question a little differently.

How long did you anticipate it would take to work up this bid? A. Keeping hard at it, it would take two or three weeks' time.

Q. Did you so indicate to Mr. Schmidt in the course of this conversation? A. I did, I was very emphatic about it.

Q. Why would it take that long? A. The Tea Company

Testimony of Frank T. Cannon

was very precise in what they accepted from you in quotations. I think my exhibit that I brought to you will show that.

We had to show the marketing areas, the locations, every area in it, plus across the board how we broke down our cost to them, from the cost of product into the silos, processed, the mark-ups, everything had to be in detail for them when you made a quotation.

This was our practice over the years.

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【6131】 supplying milk to A & P sometime in 1965, did you speak to anyone else at A & P with respect to that, other than Mr. Schmidt? A. No, sir, I did not.

Q. Did you speak to other people in Bowman with respect to that subject? A. Yes, sir.

Q. Did anyone else from Bowman, to your knowledge, discuss the subject with anyone from A & P; that is, other than yourself? A. Not to my knowledge, no, sir.

Q. What was your next contact with Mr. Schmidt subsequent to this meeting that you have just described sometime in July of 1965? A. I don't quite follow you, Mr. McInerney. Would you say that again, please?

Q. I think you told us about a meeting you had with Mr. Elmer Schmidt in July of 1965 and at this time he requested a bid or quotation from Bowman, and I was going to ask you what your next contact with Mr. Schmidt was on that subject. A. All right, sir.

Before I made my next contact, of course, we prepared this document, this series of exhibits here.

Q. Let me interrupt a moment and ask you how that was prepared. A. That was prepared by our senior cost accountant, Dave Parmalee. He did a great deal of the cost

Testimony of Frank T. Cannon

work on it, with some help from myself. Most of our evenings were spent in preparing [6132] this. We tried to keep it as quiet as possible and not excite anybody in the Bowman Dairy as to the possibilities of our securing a large-size account such as this.

Things seem to travel very rapidly in the dairy industry, and we worked evenings, just he and I alone, and on occasion our attorney, L. Edward Hart, also sat in with us and discussed some of the cost factors with us.

Q. Do you recall the name of Mr. Hart's firm? A. Yes, it is Montgomery, Hart, Pritchard & Harriet.

Q. Where is that law firm or was that law firm? A. In Chicago.

Q. Is it still in Chicago? A. To the best of my knowledge it is, but Mr. Hart is now deceased.

Q. What was the reason for discussing with Mr. Hart? A. Well, our total sales organization was pretty well under Mr. Hart's supervision back from a judgment that had been rendered somewhere around 1953.

Q. Do you recall the name of the case? A. Yes, the Bowman Dairy Company v. The Federal Government; and then there was some civil action, and I don't know the terminology of it, by the Dean Foods Company.

Mr. McInerney: Would you mark this for identification as A & P Exhibit 51.

Mr. Mathias: May I have the opportunity to briefly [6133] review this before it is shown to the witness?

Judge Hinkes: Certainly.

Mr. Mathias: I was handed it just before the hearing and was engaged in other work and was unable to review it.

Judge Hinkes: You may.

Mr. Mathias: All right, Mr. McInerney.

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By Mr. McInerney:

Q. Would you look at RAPX 51 and tell us, is that the Government decree to which you had reference in your previous answer? A. Yes, sir, this is it.

Q. And I believe you said that subsequent to this decree Mr. Hart was pretty much in charge of your sales operation. Why was that? A. Well, yes, he was, in this respect, that so much of my duties had to be cleared through Mr. Hart, or Mr. Hart's office in his absence. We were compelled, because of this restraining order or final judgment or whatever term this is, that we had to have list price and work on a discounted basis on the amount of milk sold to a store.

In other words, every store had the same list price and they were rebated a certain amount of money at the end of the month by check according to their category that they fell in.

Now if we had to deviate in any way from that list price—list discount system, I had to have my salespeople bring in an affidavit that would be signed by the person that claimed **【6134】** that they had a better competitive offer, whether it would be a better price or a piece of free equipment or a loan without interest, anything that deviated from that list-less-discount had to be verified in writing, certified by the storekeeper or the customer's signature, with our own salesperson signing it also as seeing the signature; and in turn I had to approve it and take it to Mr. Hart's office for clarification and understanding that we could meet the conditions that existed in that particular account.

Mr. McInerney: I offer A & P Exhibit 51-A and subsequent letters in evidence.

Mr. Mathias: No objection.

Judge Hinkes: It is received.

Testimony of Frank T. Cannon

(The document referred to was marked Respondent A & P Exhibit 51-A through -G for identification and received in evidence.)

Mr. McInerney: That is 51-A through -G, may the record note.

By Mr. McInerney:

Q. Before you brought your letter of August 31, 1965, your letter offer over to Mr. Schmidt, was this proposal reviewed by anyone else on behalf of Bowman? You mentioned the senior cost accountant, Mr. Parmalee; the attorney, Mr. Hart; and yourself. A. Yes, sir, it was reviewed and agreed to that I make the presentation, by our president, who was then T. J. Kullman, and [6135] our board chairman Francis Kullman.

Q. Would you tell us what happened next. I am going back now to a point where I interrupted myself and you, and I apologize. What was your next contact with Mr. Schmidt with respect to this proposal subsequent to the meeting you describe in July 1965? A. I believe the exact date that is on the letter, I presented that proposal to Mr. Schmidt at his office on Pulaski Road in Chicago.

Q. What did you say to him, and he to you, on that occasion? A. He reviewed it thoroughly. When I say "thoroughly," I mean by asking me a question or two as to the areas and servicing of the accounts and such things as this, could we handle it, could we reach certain areas, because it was in far-reaching areas, but we did have branch offices or branch distribution stations every place that is mentioned in that contract we could have reached within reason of delivery systems.

We didn't get too deeply involved in the other details. He wanted to study it, meaning the pricing.

As I recall it, our meeting was not too long at that time.

Testimony of Frank T. Cannon

Q. What was your next contact thereafter with Mr. Schmidt with respect to this? A. Again guessing at time periods, it was a week or so or maybe a little bit longer, I had a phone call asking if I would come back to the office to discuss in detail some of the points that he had gone over with his superiors at the Tea Company.

【6136】 So we subsequently made a date for me to come over, and he reviewed the private label pricing with the standard label, as we call it, or the Bowman label, and why we would sell them both items at the same price. I discussed my own and our company's philosophy on that.

Q. Please tell us as best you can recall what you said to him. A. I am not a cost accountant, but in working with our cost accountants over the years and our own knowledge of cost, we could not substantiate in any way a differential between private label and brand label or standard label. We could see no savings to be had in it.

So this was our philosophy, that we could sell them either one at the same price but we didn't care to go into low-volume items in private label.

The offer was made on some around 10 or 11 or 12 items that we would give them private label or our own label, either one. All other of the 20-some items we bid on would be on the Bowman label, meaning the low-volume items.

Q. You mentioned this was your philosophy and Bowman Dairy philosophy that you would sell both at the same price, private label and brand label? A. That is correct.

Q. Are you aware other companies have different philosophies? A. Yes, sir, I am.

In our own company we had a private label we were putting 【6137】 up, not in fluid milk but in ice cream, and we sold it at the same price we did our own standard brand label to the same customer.

Testimony of Frank T. Cannon

Q. Bowman was consistent in that? A. Yes, sir. To the best of my knowledge I cannot recall that we ever had a differential between a private label and a brand label.

Q. Are you aware whether or not competitors of Bowman had a different philosophy and gave lower prices for private label? A. Yes, sir, I am aware of it.

Q. What was their philosophy?

Mr. Mathias: Your Honor, I will object to speculation as to philosophy for competitors unless there is some foundation as to how his knowledge was gained.

Mr. McInerney: I think his experience over decades, I think it is now 40 years in the industry, I think he is qualified to answer the question.

Judge Hinkes: Only if the philosophy, which involves a mental response, was communicated to the witness. I think you would have to demonstrate that he knew their philosophy, which is something different from knowing their practice.

Mr. McInerney: I will rephrase the question.

By Mr. McInerney:

Q. Have you from time to time, Mr. Cannon, heard from customers of yours that they could obtain better prices on private [6138] label milk and dairy products than on brand label milk and dairy products? A. Yes, sir.

Q. And do you know, as a result of those conversations, that competitors of Bowman have regularly offered lower prices on private label milk and dairy products?

Mr. Mathias: I will object to that as being far too broad in view of the response; a regular practice as a result of reports from some customers.

Judge Hinkes: I will sustain the objection.

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Perhaps you should ask the witness what he learned from the customers, Mr. McInerney, and I think that would be much preferable than suggesting what he learned.

Mr. McInerney: Very well.

By Mr. McInerney:

Q. Would you tell us in your own words what, in general, you have learned from customers of yours, Mr. Cannon, with respect to the practices of other dairies on pricing private label as compared with brand label products? A. Shall I say in the realm of my period of time with the Bowman Dairy Company?

Q. That would be fine. A. Yes, there was a major company in the Chicago market I was well acquainted with that I knew their practice very well of offering private label and they did offer private label to the I.G.A. stores in Chicago at a lower than their own brand label.

【6139】 Q. Have you become aware of other competitors who have similarly priced private label offers at lower prices than their own brand label? A. Yes, sir.

Q. On the basis of that experience is it fair to conclude that other companies have a different philosophy with respect to private label pricing than Bowman did?

Mr. Mathias: Again we are getting back to philosophies and there is no showing of contacts in this line of questioning between the witness and the other dairies so that he would be qualified to speak as to their philosophies.

Judge Hinkes: I think I must sustain the objection. I think we understand what the practice was from the witness' experience and that is about all we can go into.

Testimony of Frank T. Cannon

By Mr. McInerney:

Q. With respect to this attitude of Bowman of price private label the same as its own brand label and specifically with respect to your offer to that effect to A&P, was there some advantage to Bowman to having A&P accept the Bowman label at the same price instead of the private label? Do you understand my question? A. Yes, sir.

I think there was an advantage not only to the Bowman Dairy Company, but to the A&P Company also in having them priced at the same label. The advantage to us was that we had **【6140】** a highly advertised brand name and if you have ever worked in marketing or merchandising work, the name of the Bowman Dairy Company was well known from as far away as European companies that came to visit us because of our system, our merchandising and marketing ideas.

We thought we could do a better job with the Bowman label in marketing and merchandising for the Tea Company. The change for the Tea Company in getting a private label is they can make a change quicker and rapidly from one supplier to the other because they have now impregnated the market with a new name and built it up. But they would have had to spend considerable merchandising and advertising money to build up that label they were going to use, whatever the name was going to be.

Q. The replaceability advantage that you spoke of, if my question is clear, if not I will rephrase it, was that an advantage to A&P, that is, that they could replace their supplier more readily once they had their private label in their store? On the other side of the coin, would that be a disadvantage to Bowman? A. Absolutely, yes, it would.

Q. In your talks with Mr. Schmidt did you try to persuade him to take to the Bowman label rather than the private label? A. I did, yes, very strongly.

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Q. You were telling us of your discussion with Mr. Schmidt subsequent to the submission of this offer which has been marked **6141** A&P Exhibit 50, you said the private label being offered at a same price as your brand label was one of the subjects discussed. What other subjects were discussed at that meeting? A. He asked me to point out where our profit came from in the quotation, the quotation was broken down in columns with all different headings, our profit was in the second column, I believe, on page G in what we call markup.

Q. I am placing before the witness A&P Exhibit 50-G and asking him if that is the page to which he referred in his previous answer. A. That is correct. That is the page I referred to.

Q. The second column on that page is entitled "Markup"? A. That is correct, yes, sir.

Q. What did you tell Mr. Schmidt about what that markup included? A. That included a markup of approximately 6 percent gross for the Bowman Dairy Company. This is the thing that he wanted cleared up for his superiors who had asked him the question, as I understood it.

Q. Was that in accordance with his previous conversation with you that he wanted to make sure Bowman was making a profit? A. That's right, yes, sir.

Q. Now, what other subjects were discussed at this meeting between you and Mr. Schmidt? A. One of the points he made was did we take into consideration **6142** here any savings for pre-ordering of merchandise? A. We had not.

Q. What did you say on that subject? A. There was no pre-requirement that he had to pre-order.

Q. Was there any savings if he agreed to pre-order the merchandise? A. Yes, there was.

Q. Was that something you discussed with Mr. Schmidt? A. Yes.

Testimony of Frank T. Cannon

Q. Did you tell him how much more he might save under such a situation? A. No, sir, I had nothing to tell him and he showed no interest in it. I might add most storekeepers don't take much interest in pre-ordering.

Q. Was anything else discussed on that occasion that you can now recall? A. Not on that visit, no, sir.

Q. Would you take a look at A&P Exhibit 50, which is now before you, and just glance over that and see if it refreshes your recollection in any way as to any other subject that came up?

Let me direct your attention to the second paragraph on page 1 which starts out "These quotations were developed by our accountants on an estimated total dollar volume of approximately \$1 million." Was that a subject that was discussed by [6143] you and by Mr. Schmidt? A. Yes, to a small degree we discussed it as to how I arrived at it and it was something that was rather difficult to do; as I stated earlier we had been given no specifications or no dollar volumes to work with for the A&P Company, only a list of stores. We sent our merchandising staff out to each A&P store and counted the counter facings in the dairy case.

Q. Will you please explain what "counter facing" consists of? A. Facing is an individual carton and they normally will put six to eight half-gallons across, six to eight facings in the dairy case and maybe put alongside of it three to four casings of quarts. Our merchandising staff, we felt, was confident enough by the display in the dairy case they could estimate the volume of the store.

This is the way we arrived at the million dollar figure we used for volume per month.

Q. Your letter continues, approximately \$1 million per month, 26 delivery-days, using Chicago list prices. Would you explain what Chicago list prices are? A. The list price is prices used in billing into the store at the store level.

Q. Is that the price that you were charging the cus-

Testimony of Frank T. Cannon

tomer? A. In this case we were charging the store this price, but it would not be the price the A&P would pay for the merchandise.

【6144】 Q. Would you explain the difference please? A. Yes, they didn't want their cost prices in the hands of their store level people and between us we would agree to determine a given figure as to what we would charge the stores as a billing price, or a list price, call it either way.

Q. Now was that practice of billing the store at a price which was different than the net price that you would charge the customer, a standard practice in chain stores? A. Yes, sir, it was.

Q. Looking at Respondent A&P Exhibit 50-T, would you please tell us what that is? A. The sheet has two lists on it, two price lists. One is the chain store wholesale list, or what we bill the store on a given day for merchandise delivered. In other words, the manager of that store would assume that this was what it cost him that day for merchandise.

Q. And for internal bookkeeping purposes the store would be charged that amount, is that correct? A. That is correct, yes, sir.

Q. Was this sheet that is marked Respondent A&P Exhibit 50-T, is that a sheet that was in use at approximately the date it bears, August 23, 1965? A. That is correct, yes, sir.

Q. For some other customer of Bowman Dairy and not A&P, is that correct? 【6145】 A. Yes.

Q. What relationship would there be between the list prices to which you refer, Chicago list prices to which you referred in your letter and the price actually charged the chain? In other words, the net price. Could you give us some idea? A. Well, the "in-store" price is probably 50 percent less than—or more than, I should say, 50 percent more than the actual cost or the price billed to the Tea Company office.

Testimony of Frank T. Cannon

Q. When you say the "Tea Company"? A. The A&P Tea Company.

Q. Is that the practice used with other chains as well? A. Yes, sir.

Q. Now referring to A&P Exhibit 50-N, which is entitled Net Delivered Prices, looking at that, can you tell us approximately the difference that there would have been between the so-called list price chain stores and the net price A&P would have been paying under your proposal, assuming you sold all the A&P stores? A. If we sold all the A&P stores and they had accepted our quotation as presented, using the first item, "quarts of homo-V.D.", their cost to them would have been .1696 per quart delivered their store. The difference between that and the—I am looking for the other exhibits.

Q. Does this Exhibit 50-N show the list price to chain stores? A. Yes, it does. If you will relate it to the 26.5 cents, [6146] this price to the chain store, you will see in that particular case it is even more than 50 percent markup.

Q. Going back to the portion of your letter that I have quoted referring to an estimation of approximately a million dollars a month, using Chicago list prices, just to carry out the calculation, if we were to assume that the total business involved here was, say, \$10 million at the net prices, what would the Chicago list prices be? A. Chicago list prices then would bring the \$10 million to approximately \$15 million.

Q. Was a volume of approximately \$1 million a month at list prices a precondition to the offer that you were making in your letter of August 31, 1965? A. No, sir, it was not. —

Q. If A&P had given Bowman the business in all of its stores, even if that fell somewhat below the \$1 million a month at Chicago list prices, would Bowman have de-

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livered in accordance with this offer? A. Yes, sir, we would have.

Q. Was the use of the term "Chicago list prices" and what you meant by that? Was that a subject that you and Mr. Schmidt discussed at this meeting that you have just been describing? A. Not in any great detail, no, sir.

Q. You mentioned that there was some brief reference to it. Can you tell us what the reference was? **[6147]** A. Yes, the only reference was we used it to determine the million dollars a month figure that we estimated the Tea Company was then purchasing.

Q. Another exhibit in this case, which is Commission Exhibit 50-A, has a notation at the lower left-hand corner in Mr. Schmidt's handwriting, "Gross-retail." This copy is very difficult to read, but I don't think there is any question about that. This is "Gross-retail."

Does that refresh your recollection as to what you said to Mr. Schmidt with respect to Chicago list prices? A. Yes, I would guess that it meant this—

Mr. Mathias: Your Honor, I will object to a guess unless Mr. Cannon can recall what the statement means. I think it has been established this was not his writing, but Mr. Schmidt's.

By Mr. McInerney:

Q. Will you tell us as best you recall?

Mr. Mathias: If he knows, Your Honor.

Judge Hinkes: Yes, we want factual information, Mr. Cannon. We don't want a guess.

The Witness: Your Honor, I think I can bring it out clearly.

It is a matter in reference to what the word "retail" means. Retail is the out-of-store price at the

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level of the store, what they sell to Mrs. Consumer at.

【6148】 If you will note, in most cases the retail pricing is very close to what the list wholesale pricing is. There is some deviations, there is no question about that. He would refer to anything out of store as retail pricing, where I would refer to it as list or wholesale price.

By Mr. McInerney:

Q. Those were roughly comparable, is that correct? A. That is correct. Some of our chain accounts, to further clarify it, they were identically the same, they would tell us what to charge the store and that same list price that we were told to charge the store was then used as the selling price to Mrs. Consumer.

Judge Hinkes: The store's profits came from the rebates or discounts, is that it?

The Witness: In this case it was direct net billing, there were no discounts.

Judge Hinkes: That is in the case of the bid you were making?

The Witness: That is correct.

Judge Hinkes: I mean for the stores.

The Witness: It would be discount, yes.

By Mr. McInerney:

Q. Can you tell us—

Mr. Mathias: If we are going to get to another page or another subject, could we have a five-minute break? We have 【6149】 been in session for some time. I believe we could all use a few minutes.

Judge Hinkes: Yes, we will take a short recess.

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(Whereupon, a brief recess was taken.)

Judge Hinkes: You may continue, Mr. McInerney.

By Mr. McInerney:

Q. You have before you, Mr. Cannon, A&P Exhibit 50-N, a page to which you referred previously this morning, and I believe you told us that the net prices shown there were being offered to A&P in the event that you were to supply —that is, Bowman were to supply all of its stores, is that correct? A. That is correct, yes, sir.

Q. In the event that something less than all of the stores were to be supplied by Bowman, were there alternative pricings that Bowman was offering to A&P? A. Yes, sir, there were. There were two alternatives.

Q. What were they? A. One for 70 percent of the stores, which is on the same page, and one for 50 percent of the stores, that is on the same page.

Q. Now you told us previously that you consulted Mr. Hart and his law firm with respect to this offer. I am not sure whether we have it yet in the record. Did Mr. Hart approve your submission of this offer as being a legal offer? A. Yes, sir.

【6150】 Mr. Mathias: I am going to object to a legal conclusion in here. I have no objection to his asking whether Mr. Hart approved the offer or not, but I think the term "legal offer" in here is a conclusion.

Judge Hinkes: I think the simplest conclusion is to ask him what Mr. Hart told him.

By Mr. McInerney:

Q. Tell us what Mr. Hart told you. A. The night before this presentation of the bid was made, Mr. Hart, Mr. —

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Mr. Mathias: Excuse me. I apologize for the interruption, but the problem with the question you have now asked is one ruled upon by Your Honor in connection with statements by one of our witnesses of a deceased associate and the problems of hearsay raised by the fact that the other party is now deceased. There is no way we can cross-examine Mr. Hart. He is now dead. I believe the testimony of Mr. Holin concerning his business associate was stricken on the ground it was not allowable under these circumstances.

Mr. McInerney: This is part of the submission of a very important bid to A&P and we are just asking for the recitation of what, in fact, occurred on the night before the bid occurred, I think it is part of the *res gestae* and I think it is highly material.

Judge Hinkes: I think I must allow this question, [6151] although I realize the difficulties of checking back where the person who made the statement has died. Nevertheless, I think under the circumstances, where the dispute apparently is between whether the attorney gave a legal opinion or just an opinion, the only solution to that controversy is to simply ask the witness what the attorney said and we will draw our own conclusion as to what kind of opinion was rendered.

Since that is the area of the dispute, I think this is simply the quickest and cleanest way of finding out what was said.

You may answer, Mr. Cannon.

The Witness: Mr. Parmalee, Mr. Hart and myself had dinner the night prior to my presenting this bid to the A&P Tea Company. I will have to assume it was on August 30 because I am sure this was presented on the 31st. We reviewed in detail the entire quotation.

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Mr. Hart actually helped me write the letter that is on pages 1 and 2 of the quotation and it was with his approval and best wishes that I presented this bid to the Tea Company the following day.

By Mr. McInerney:

Q. I think you told us it was customary in submitting offers of this kind that you did review them with your attorneys ever since the time of the Government decree to which you referred? A. That is correct, yes, sir.

【6152】 Q. And even in meeting competitive offers, you would not meet competitive offers without a written statement from the customer who got the competitive offerers witnessed by your salesman and submitted to Mr. Hart, is that correct? A. That is correct, yes, sir.

Q. In submitting this quotation, you were not meeting a competitive offer, were you? A. No, sir, we were not.

Q. Did Mr. Parmalee review the offer from the point of view of cost accounting? A. Yes, sir, he did.

Q. Did he also approve the offer? A. He did.

Q. Incidentally, were variations from published list prices or published discounts of dairies fairly common in the Chicago area at the time to which we are referring? A. Yes, sir, it was very common.

Q. Was it difficult or easy for you to find out what your competitors were offering customers such as A&P or other chain stores? A. In the major accounts it was very difficult.

Q. Was this regarded as a trade secret by members of the dairy industry? A. I believe so, yes.

Q. Would you have any way of knowing what other people were 【6153】 quoting to A&P for this business? A. No, sir, none at all.

Q. On what basis were the prices offered by Bowman in A&P Exhibit 50 for the milk products? On what basis

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were they being offered in terms of the butterfat content of the milk? What was the butterfat content? A. They were offered on the basis of a 3.5 butterfat content.

Q. Is that reflected in your letter marked Defendants' Exhibit 50? A. I believe it is, yes.

Q. At the time that Bowman had been supplying A&P with milk prior to 1958, about which you have testified—

Mr. Mathias: Excuse me, I hate to interrupt, but could I have the last question and answer read back? There was a page reference that escaped me.

Judge Hinkes: Read the question and answer.
(The reporter read the question and answer.)

By Mr. McInerney:

Q. You have told us previously that prior to 1958 Bowman supplied A&P with milk and that sometime in that year Bowman was rather abruptly cut off by A&P, is that correct? A. That is correct, yes, sir.

Q. Did you have any long-term contract with A&P or were they free to cut you off? A. No, sir, we had no contract at all. They were free to cut [6154] us off.

Q. Is that typically true with respect to supplying chain stores? A. That is correct.

Mr. Mathias: I will ask that the witness be limited to his own knowledge.

Judge Hinkes: Yes, we are interested only in what you can supply from your own knowledge.

The Witness: I will not deviate from that. These are the facts as I know them. There were no long-term contracts in all the accounts I visited in the City of Chicago and tried to do business with.

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By Mr. McInerney:

Q. Now when you were supplying A&P, do you know what the butterfat content of the milk was? A. Yes, sir, I think it was—I firmly believe it was at 3.5 percent butterfat or higher. My reason for believing that that far back, which is a long time ago, is the great to-do we made in promoting our product on the street and talking about the high butterfat content of the product. The two Kullman brothers, the principal owners of the company, made us highlight that all the time, that we sold milk at much higher fat content than anybody else.

— Q. Now, if A&P had asked you to supply a 3.4 percent butterfat content in supplying milk to them, would a cost saving have [6155] resulted in doing so? A. Yes, sir, it would have.

Q. Would Bowman have supplied it at 3.4? A. We would have supplied it at anything down to the limit of 3.35 percent for the State of Illinois.

Q. Can you give us some idea of why there is a saving involved in a reduced butterfat content? First of all, is it a difficult operation to reduce the butterfat content to the desired percentage? A. No, sir, it is not. It is a matter of the separation of the fat from the milk.

Q. Is there always, or is there usually some separation of fat from milk? A. It is done every day.

Q. And does it cost any more to reduce it down to 3.5 or 3.4 or 3.25? Is there any difference in cost? A. No, sir, there is none.

Q. What happens to the butterfat that results from that separation? Is that a valuable commodity? A. Yes, sir, it is. If you are in the manufacture of ice cream, you would use it in your own company, the butterfat, to use it for the manufacturing of mixes that would go into ice cream, or you can sell it on the open market to people who do make mixes and ice cream.

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Q. Does butterfat have a recognized market value on the open [6156] market as butterfat? A. Yes, sir, very definitely.

Q. In your dealings with Mr. Schmidt with respect to this proposal of Bowman's to supply A&P, were you able to tell whether Mr. Schmidt was very knowledgeable about the dairy industry and purchases of dairy products? A. No, sir, in my own humble opinion, I didn't think very highly of Mr. Schmidt's ability at all. Being a member of the trade associations in the area, there were many of us that felt the same way about it.

Q. In the event that A&P wanted some butterfat content which might be different from the butterfat content at which Bowman was supplying other customers and had accepted your suggestion that they take it in Bowman-labeled milk, would that have caused any insurmountable problem? A. No, sir.

Q. How would you reconcile any difference? A. Really, we would standardize down to the 3.5 fat for the filling purposes, for the product, and of course the cartons would just be run at a separate time from the others that might want a different fat content. We would have to separate them and that would be not a factor though. It would be nothing more than a separation of product in the cooler later on for cooling purposes.

Q. Was Bowman supplying other purchasers of milk with milk [6157] at butterfat content other than 3.5 at the time of this offer?

Mr. Mathias: Your Honor, I would like the witness to be instructed again that the question should be answered if it is within his own knowledge. I do not believe that the background of Mr. Cannon, as stated in his earlier testimony, has shown that he had anything to do with the processing end of the operations of Bowman Company.

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Judge Hinkes: If this is within your own personal knowledge, you can answer the question.

The Witness: I can't answer that I know it, no, sir.

By Mr. McInerney:

Q. Now you were telling us about your meeting with Mr. Schmidt on the occasion of his calling you to explain certain facets of the offer that you had submitted to him, which has been marked A&P Exhibit 50. My question now, sir is, is there anything else that you recall about that conversation? A. Yes, there sure is. I came out of the meeting very elated. I might add ten feet tall, thinking I had secured the business. It was an impression left with me by Mr. Schmidt at that meeting. Not that he told me anything or said that I had it, but buyers have a way of indicating to you when you have done something good, or you are in a good position and even to this point I reported back to my superior, who was the president of our company, that he had promised me after I told him how I felt that I would be properly rewarded for my good work. It never [6158] turned out that way.

Q. How did you learn it didn't turn out that way? A. After a period of time, it could be two weeks, a little bit less or a little bit more, I didn't hear anything further from Elmer about it and I called him on the phone. I told him I was quite anxious and I went on to explain all the things we had to get into such as getting a supply of cases in because when you take on some 250 stores, whatever the exact figure is, you can multiply that by the number of cases you need and we have what we call a float factor of five to seven cases per store for tripage.

It would mean maybe some 30,000 or 40,000 or 50,000 cases we would have to order and get supplies. I went into some detail like this with them, kind of pushing me

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to get the answer. I got the answer, just simply this, that he and his company had reviewed it, his superiors had reviewed our quotation and again the other quotations and there was such a little difference between the two that they had decided not to make any change.

Q. Did you have any further contact with Mr. Schmidt from that day to this? A. None that I can recall, no, sir.

Q. How long were you with the Bowman Dairy Company in all, approximately how many years? A. 32 and a half years.

Q. To the best of your knowledge and belief, what was the [6159] attitude of the Bowman Dairy Company at this time in 1965, the time that you submitted the bid to A&P with respect to compliance with the Robertson-Patman Act? A. I believe we were adhering to it as exactly as we could, from a layman's point of view.

Q. Was this a subject that you had conversations with Mr. Hart on, as you indicated previously on a number of occasions? A. I think it was daily with Mr. Hart or one of his attorneys in his office in his absence.

Q. Did you comply with their advice with respect to compliance with the Government decree? A. I had to under threat of discharge if I didn't, if I was found not complying with what the lawyers had told me I had to live with.

Q. Did you, in fact, comply with what the lawyers told you? A. I did, yes, sir.

Q. Was that also true on this particular occasion, your compliance with your lawyers' injunctions and advice? A. Yes, sir.

Q. Was this system of—excuse me, let me rephrase that.

If A&P had accepted this offer, was Bowman prepared to offer the very same prices to its other customers such as Kroger and High-Low? A. Yes, sir.

Mr. McInerney: We have no further questions.

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【6176】 * * *

Q. Was there any reason why the obtaining of a new large amount of business was particularly significant to Bowman at that time? A. I don't think any more significant than to anybody else when they get a large piece of business. It would mean more employees and more work, and the like of that.

Q. You have mentioned that Bowman sold out eventually to Dean Milk Company. When did this sale occur, Mr. Cannon? A. The actual date of the signing was January 19, 1966.

Q. Were the negotiations in process at the time this contact was received from A&P? A. I wouldn't know that. I couldn't answer that. Looking back, I could assume, but I don't want to do that.

Q. During the course of your working on the proposal to A&P, did you become aware at any time prior to August 31 that there were negotiations underway with the Dean Milk Company to sell out? A. There were rumors.

Q. Did the president or any of your other superiors in the Bowman Company ever mention the possibility of a sale to Dean?

Mr. McInerney: Is this prior to—

【6177】 The Witness: At what point, sir?

By Mr. Mathias:

Q. Prior to August 31, 1965? A. No, sir.

Q. You stated in your direct in 1965 you became general manager in charge of merchandising, marketing, advertising and, I believe, some other functions. Approximately when in 1965 did this promotion occur? A. I think it was in the month of January.

Q. And who had been your immediate predecessor? A. Mr. Albert A. Clarke.

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Q. Who was in charge of the plant operations of the Bowman Dairy Company during this period July, August and September of 1965? A. In total, are you talking about?

Q. Yes, the regular day-to-day operations of the processing plants, yes. A. There were many plant managers.

Q. Was there one man in charge of each? A. Yes, there was a man in charge of each plant.

Q. Let's start with them. Who was in charge of each of the processing plants?

Mr. McInerney: I believe this is also beyond the scope of the direct examination.

The Witness: I would be pressed for names of persons [6178] on that level.

By Mr. Mathias:

Q. Was there anyone in charge of all your processing plant operations? A. Yes, Albert Geiss.

Q. Were you the only one from Bowman who had any direct contact with A&P personnel? A. At what time, sir?

Q. During this period of bidding in August and September 1965? A. During this period of the quotation, I am the only one that I am aware of.

Q. Mr. Cannon, you stated that when you were first contacted on the phone by Mr. Schmidt that you discussed this with your superiors and you used the words similar to the effect that you were concerned as to whether or not this might be a fishing activity to determine the market level.

What did you mean by this, sir? A. Well, I could only assume that the A&P had accepted a new increase in price from Borden and they were trying to find out at what level their pricing should be in the marketplace.

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Q. Was this a common practice in chain accounts? A. It wasn't unusual, that's right.

Mr. McInerney: I think it would be proper to move to strike the answer on the basis of the assumption, but I don't [6179] want to prolong this. I am sure when Your Honor is weighing the evidence the fact this was stated as an assumption rather than a fact will be quite clear.

By Mr. Mathias:

Q. You had had experience with this type of activity from chain accounts in the past, would that be correct, Mr. Cannon? A. Yes, I had.

Q. Now, Mr. Cannon, you stated that you and Mr. Parmalee and Mr. Hart worked up the quotation for A&P. I believe you said that this occurred over a two- or three-week period, is that accurate? A. That is approximate, yes.

Q. I believe you also stated that your merchandisers were sent out to the various A&P stores and made estimates of the sales volume to each of these stores, is that correct? A. That is correct.

Q. Approximately how much time was allotted or how much time did this take? A. That is a pretty difficult question. Our staff probably amounted to about 20 or 30 people. You can relate that to some 250 stores. I am using a guess for that figure of 250. It would take probably maybe an hour in some stores and knowing our people as well as I did, I daresay they went right in and knew the manager well enough to ask him, "What the hell are you selling?" And they would have been told.

[6180] We have people in the field for 25 and 30 years that knew everybody in their area.

Q. What I was getting at was the approximate length

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of time it took to gather this information together? A. I would have no way of telling this.

Q. Would this have been a week or two? A. I am guessing at that, about two weeks, yes.

Q. Now, did A&P give you any information as to sales volumes of any individual stores? A. No, sir, only the statement I made this morning, they gave me a list of stores.

Q. Sir, I know in connection with A&P Exhibit 50 that the last couple of pages of this exhibit—that would be 50-U through 50-W—appear to reveal your sales experiences with A&P during the period 1946 through 1957 in the sales of various milk and milk line products; is that correct? A. That is correct, yes, sir.

Q. Were these sales figures used in any way to augment your estimates of the sales volumes involved here? A. No, sir, they were not. This is just a little bragging on our part, my part, I should say, to show them how much help we were to them in improving their sales over a period of time.

Q. So your estimate of the sales volume then was based strictly on the stores surveyed by your merchandisers? A. Yes, sir.

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【6187】 * * *

Q. Sir, is there any place on Respondent A&P Exhibit 50-B where it is stated that the homogenized milk to be sold to A&P under this quotation, if accepted, was 3.5 percent butterfat? A. No, but—

Mr. Mathias: I would like the witness to be asked to respond just yes or no to that.

Mr. McInerney: I object. I think he should be allowed to respond fully.

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Judge Hinkes: I think the witness should be provided the opportunity to respond fully.

The Witness: As you stated, Mr. Mathias, it doesn't specifically spell out 3.5 butterfat, nor does it say there should be less than 3.5 percent butterfat.

Judge Hinkes: Was there anything in your bid that would prevent you from lowering the butterfat content from 3.5?

The Witness: We could have gone down, sir, anything to 3.25 according to law. It is my recollection and belief that we bid at 3.5.

Judge Hinkes: But is there anything in the contract, **【6188】** that is in the bid offer, that would have prevented you from going down?

The Witness: I don't quite know how to answer that for you. I am trying to follow the question.

Judge Hinkes: You have a quote, that is Exhibit 50. That quote has certain specifications. Were any of those specifications such as to prevent you from fulfilling the contract at 3.4 butterfat?

The Witness: No, we could have done it at 3.4. But remember, in my earlier testimony I said we received no specifications from the Tea Company other than a list of stores.

Judge Hinkes: Very well.

By Mr. Mathias:

Q. Is there any place in this offer on any page where it is stated in so many words that the homogenized milk to be supplied to the A&P Company under this quotation, if accepted, would be 3.5 percent butterfat?

Mr. McInerney: May I have the question read back?

Judge Hinkes: If you will, please.

(The pending question was read by the reporter.)

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The Witness: I thought I had answered that before, Your Honor, but I will give the same answer again.

Although in my mind 3.5 butterfat on the top of page 2 refers to what—this refers to what we are going to use, and it doesn't say we are going above or below that 3.5.

【6189】 *By Mr. Mathias:*

Q. It doesn't, however, state the milk will be 3.5 percent butterfat.

Mr. McInerney: I think the witness's testimony is quite clear.

Judge Hinkes: I am not sure I understand the last response of the witness. What were you referring to?

The Witness: The top of page 2 says, paragraph 1, "Chicago area prices are quoted on the basis of the present Order Number 30 price, plus a super pool which totals \$4.32 per hundredweight for 3.5 percent Class I milk products."

It is my contention that I answered that by saying that this is my belief that I bid on 3.5 percent butterfat and at no place in here does it say I bid less than 3.5 percent butterfat.

By Mr. Mathias:

Q. We did cover in prior testimony this 3.5 percent figure is used in connection with Class I milk products, is it not, sir? A. Yes, that is right.

Q. And we have just gone through a number of products which varied in butterfat content from 5/10 of a percent up to over 32 percent, which were all Class I milk products; is that not correct, sir? A. That is correct.

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【6197】 Judge Hinkes: If he meant gross profit, that is one thing. If he meant net profit, that is another.

Mr. McInerney: Mr. Schmidt didn't talk of net or gross profit, he said overhead and profit.

Mr. Mathias: I don't see that the notation of Mr. Schmidt is correct. The figure included overhead and profit. This is the statement he made to Mr. Schmidt. I don't see anything to argue about.

Judge Hinkes: I wasn't sure the witness stated just exactly that. I wanted to be certain I knew what his answer was. For the sake of the record and for my information as well, I would like to have the witness tell me now once again what you are saying is correct, Mr. Cannon.

The Witness: At this point, I am quite confused but, to get back to the points, the statement I made in my direct examination this morning was a 6 percent mark-up and when we talk about mark-up, we talk about gross mark-up.

Now, if Mr. Schmidt made the statement, is overhead included in that, I may have said yes to it. He asterisked on there. I can't say I said yes, but the overhead would be in the 6 percent mark-up.

Mr. Mathias: The overhead would be in this 6 percent mark-up?

The Witness: Yes.

Mr. McInerney: Your Honor, may I ask a question?

【6198】 Mr. Mathias: He can do that on redirect.
Judge Hinkes: Keep it in mind, Mr. McInerney.

By Mr. Mathias:

Q. Referring to the fourth column on Respondent's Exhibit 50-G, there is a reference to "direct vanning costs to sales area." What is meant by this term? A. That is

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where it had to be transported from the bottling or processing plant to distribution points. It was averaged out in the cost.

Q. In the next to the last column, I see a heading "Commission". What is the meaning of this column? A. That is the wages that the route deliverymen earn, their commissions.

Q. Your route deliverymen were paid on a commission basis? A. That is correct.

Q. So they were paid so much of a percentage based upon the volume delivered; is that it? A. On a graduated scale, yes.

Q. Sir, referring back to the first column, the "Direct cost f.o.b. Chicago area plant," I believe you stated that Mr. Parmalee, with your assistance, computed the cost figures in this offer; is that correct? A. That is right.

Q. Now, sir, was the cost figures which are included in this column on A&P Exhibit 50-G based upon the anticipated volume **【6199】** of the A&P business?

Mr. McInerney: As Mr. Mathias pointed out before, if he knows.

Judge Hinkes: Yes, if he knows.

The Witness: I can't answer that, I really can't answer that correctly.

By Mr. Mathias:

Q. In connection with Respondent A&P Exhibit 50-H, which I believe you have previously described as the basis of the first column on 50-G, the first column on this page, 50-H, refers to the "Raw merchandise cost f.o.b. Chicago Plan." I take it that should be "Plants." A. I assume so, sir.

Q. Down below I see Class I price, \$4.32 per hundred-weight, which is that cited on 50-B as being the federal order price plus a super pool.

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Now, sir, do you know whether or not there were any other raw milk costs to the plant other than this basic federal order price and super pool? A. Yes, there were.

Q. Were all of the various elements of raw milk cost included in this column entitled "Raw merchandise cost f.o.b. Chicago plants." A. Yes.

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【6209】 * * *

Q. In connection with those prices under "50 percent of the stores," sir, that would be the last column. Were these prices developed on the basis of the costs calculated in connection with the estimated volume of 50 percent of the stores? A. Yes, the volume going through the plant, correct.

Q. And in connection with 70 percent of the stores, did you and Mr. Parmalee calculate these prices out on the basis of the volume that you would realize in your plant from 70 percent of the stores? A. Yes.

Q. Now, sir, in response to questioning by Mr. McInerney on direct, you had stated that you would have made this offer to other of your customers such as Kroeger and High-Low. At the time the offer was made to A&P, was it made to any other customers? A. No, sir.

Q. Was this considered? Did you consider making the offer at the same time you made it to A&P? A. We discussed it, yes, but we decided we did not have the right to offer it then because we wouldn't have the volume in the plants to bring the cost down.

【6210】 Q. You were dependent on this additional volume in order to offer the prices included in your quotation? A. That is correct, yes.

Q. Why was this new volume so important to this offer? A. I don't think it was that important.

I don't follow the question, Mr. Mathias.

Q. Why was it important to obtain additional volume in your plant before you could offer these prices to the com-

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petitors of A&P? A. You are prorating the cost of your total operation, all equipment, all machinery, the buildings, everything over more units, that brings your fixed burden down.

Q. If A&P had accepted this offer, would you have made the same identical offer to other accounts? A. Like size accounts.

Q. In other words, Kroeger and High-Low? A. Yes.

Q. Would you have made the offer available to independent stores or chains of a few stores? A. No, sir, we didn't have them to offer it.

Q. I don't understand that. A. We didn't have the others to offer it to. Those were the only two chains we had left at that time, Kroeger and High-Low.

Q. You did serve other stores? A. That is right, independent stores.

【6211】 Q. Would you have offered it to any of the independent stores? A. No, sir.

Q. In your dealings with Mr. Schmidt, did he ever ask you if this offer was available to A&P's competitors? A. Yes.

Q. Did he ask you if you were then charging any of the A&P competitors on the basis of this pricing system? A. Would you do that over for me? I am not sure I understand it.

Q. Did Mr. Schmidt ask you if at that time, the time of the offer, you had made this pricing offer available to any of A&P's competitors?

Q. Yes. A. I don't recall that, no, sir.

Q. Now, sir, I note that in connection with the Illinois market area that your quotation offered to serve the A&P stores on a six-day delivery basis; is that correct, sir? A. That is correct.

Q. Was there any reason why this was so? A. Yes.

Q. What was that? A. Union requirements.

Q. What union—I take it this is your drivers union? A. That is correct, sir.

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Q. What drivers union did your routemen belong to in Chicago?

【6212】 Mr. McInerney: I think this is well beyond the scope of direct, Your Honor.

Judge Hinkes: I think it is necessarily connected to the previous answer of the witness. I don't think we need to go any further than that, but counsel is entitled to an answer to his question.

The Witness: Teamsters Local 753.

By Mr. Mathias:

Q. In the Indiana area, I believe you mentioned you paid your drivers a commission there and that this was a matter of union contract. Do you recall what union was involved in the Gary, Indiana area? A. I can only recall that it was a Teamster local, I don't recall the number.

Q. Would number 835 refresh your memory? A. That could be it.

Q. But your routemen there were members of the local Teamsters union? A. They were, yes.

Q. In connection with the areas where you offer three-day delivery, is it possible that some of the A&P stores would not be equipped to take three-day delivery?

Mr. McInerney: I object, Your Honor.

Judge Hinkes: I don't think we want to talk about possibilities, do we, Mr. Mathias?

【6213】 Mr. Mathias: The reason I am getting into this at least in one of the zones involved in this matter, insofar as the Borden offer was concerned, three-day delivery was made available to the stores and yet a few of the stores chose to take a greater number of days' delivery.

Mr. McInerney: I still don't see that the question is at all competent.

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Mr. Mathias: I am asking does he know if some of these stores—

Judge Hinkes: That was not your question.

By Mr. Mathias:

Q. Do you know whether some of the stores in the Indiana area were not equipped for three-day delivery? A. I do not know.

Q. Sir, do you know whether or not the union requirements in Lake and Porter Counties could permit three-day delivery at this period of time? A. I do know that, yes.

Q. Is it your opinion that it would? A. They did permit less than six days a week.

Q. Sir, between the time that you had completed your dealings with Mr. Schmidt and the time you were first contacted by A&P counsel, I believe that it has been previously noted on this record that you hadn't done a great deal of thinking about these negotiations? 【6214】 A. That is correct.

Q. Would it be correct to say that your recollection is hazy as to many portions of the dealings and surroundings of these various negotiations?

Mr. McInerney: I object to that.

Judge Hinkes: I think I must sustain the objection. I think that an overall question such as that is meaningless. I think the inquiry should be made with specific questions when you have them and not a summary. Obviously, some events may be very clear in this witness's mind.

Unless you wish to ask the witness whether all of it is hazy, that would be permissible, but to say that "most," then we won't know anything.

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By Mr. Mathias:

Q. Were all of your recollections hazy as to most of these events? A. No, sir.

Q. You are quite certain that union regulations allowed three-day delivery at this time? A. Yes.

Q. Do you recall the name of the Bowman employee who was the branch manager in Gary, Indiana at this period of time, sir? A. I believe it w . John Kalchbrenner. The reason I am slightly hazy there is there was a retirement just about that time when a Mr. Al Selmer left.

【6215】 Q. At the time of this quotation, did you have any discussions with any union representative in the Indiana area? A. No, sir, none that I can recall.

Q. Now, sir, referring again to your A&P Exhibit 50-H—excuse me, G and H. Strike the question.

Mr. Mannon, it has been established in your previous questioning that Bowman subsequently sold out its operations to Dean in January of 1966; is that correct, sir? A. That is correct, yes.

Q. And Bowman at that time ceased to exist in the Chicago market? A. That is correct, yes.

Q. In your opinion, would there have been any change in this decision to sell out had Bowman obtained the A&P business volume involved here?

Mr. McInerney: I object to that, I think it calls for speculation and no groundwork has been laid for it.

Mr. Mathias: The man was general manager of their operations at this point. I believe he is qualified to state an opinion.

Mr. McInerney: He already said he knew nothing of the negotiations that lead up to that.

Mr. Mathias: Prior to August 31, he stated that. He has not said he knew nothing of the negotiations after that.

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Judge Hinkes: I am going to allow him to answer the [6216] question. The gentleman was a member of the company and had an assumed familiarity of the processes that must have gone on.

You may answer.

Mr. McInerney: Would you like the question read back?

The Witness: Yes, and I will only give you a factual answer, not an assumption.

Judge Hinkes: Do you recall the question?

The Witness: No, I would like it repeated.

Judge Hinkes: Would you read the question?

(The pending question was read by the reporter.)

The Witness: I had no factual information regarding that at all.

Judge Hinkes: Where was the decision made to sell, at what point of position within Bowman?

The Witness: I would not know that answer. I was only an associate director. That was decided by the directors themselves.

Judge Hinkes: You did not participate in that?

The Witness: No.

By Mr. Mathias:

Q. Was there any discussion at any meetings you attended? A. Yes, there were.

Q. What was the earliest date of such a discussion in which you took part? [6217] A. Sometime in November or December of 1965 they finally brought the rest of us into it to start telling the story and that story wasn't told to us. It was told to us that they were considering production mergers. This is how this whole thing got started and apparently they had been talking about it for some time.

Q. It was indicated they were talking about it for some time? A. That is an assumption, I really don't know that for a fact.

Testimony of Frank T. Cannon

Mr. Mathias: If I may have a few minutes' break, I don't believe I have a great deal more cross, but I would like to go through my notes.

Judge Hinkes: Very well.

Mr. Mathias: We would like to have about five minutes.

Judge Hinkes: Very well, we will be in recess for another five minutes.

(A brief recess was taken.)

Judge Hinkes: Back on the record. Mr. Mathias?

By Mr. Mathias:

Q. Mr. Cannon, you told us in response to an earlier question that Mr. Schmidt did ask you in this offer would be made available to A&P's competitors. Did you inform him, as you have us, that this would be made available to your other chain store customers? 【6218】 A. I informed him it would be made available to them, but I would never tell him it would be the same price. We never gave that information out, to be honest with you.

Q. Since you have moved to Canton, Mr. Cannon, have you had any business association with A&P in that market area? A. Very little. I called on them at the Cleveland office a number of times, but I have done no business with them directly myself. I have not secured the business in any way. The little bit we had was there before I came to Canton.

Q. You have been soliciting business? A. Yes.

Mr. Mathias: No further cross, Your Honor.

Judge Hinkes: Mr. McInerney?

Redirect Examination by Mr. McInerney:

Q. Mr. Cannon, you told us in submitting this bit, A&P Exhibit 50, you were offering A&P milk with a 3.5 percent

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butterfat content at those prices and that if the butterfat content would be reduced, that you would reduce the price to A&P in accordance with the value of the butterfat?

Mr. Mathias: I will object to this form of questioning. This is Mr. McInerney testifying. It is Mr. McInerney's witness. I believe this is highly irregular. It is a summation. I don't recall any testimony exactly of the nature of that stated by Mr. McInerney and I believe it is highly unfair for [6219] him to characterize the testimony and try to summarize it in such a way to his own witness.

Judge Hinkes: I believe you should avoid that, Mr. McInerney.

Mr. McInerney: I was trying to save time, Your Honor.

Judge Hinkes: I don't question your good faith, but you could be wrong and prejudice the record.

By Mr. McInerney:

Q. In offering this bid, were you offering A&P the price stated therein at 3.5 percent butterfat content? A. Yes.

Q. If that butterfat had been reduced, would you have given A&P lower prices in accordance with the butterfat taken out? A. Yes, we would have.

Q. In response to a question from His Honor, you said that you would be legally free to reduce the butterfat content down to as low as 3.25 percent, do you recall that? A. That is correct, I do.

Q. If you had done that, would you have given A&P the benefit of whatever reduction resulted in your cost? A. Yes, we would have.

Q. Now, if Bowman had in fact reduced the butterfat content of the milk being supplied to A&P lower than 3.5

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and didn't tell A&P about that and instead kept the resulting cost saving for [6220] itself, would you consider that honest? A. No, sir.

Mr. Mathias: I am going to object to that question strenuously; first of all as being hypothetical, secondly as being quite leading, third as being totally irrelevant in any event.

Judge Hinkes: I will sustain the objection. What the witness may have thought is not relevant to this proceeding. Perhaps what he would have done was another story but what he might have thought we shouldn't get into.

By Mr. McInerney:

Q. Would that have been consistent with what you were offering to A&P in Exhibit 50?

Mr. Mathias: I will object again that the question is tainted and improper to this witness.

Mr. McInerney: I object to the adjectives "tainted" and "improper."

I think the question is relevant to get the witness's opinion as to whether the butterfat content was consistent with the offer he was making.

Judge Hinkes: I will allow it.

The Witness: We would not have reduced the butterfat content without talking to A&P about it and discussing the facts with them.

Q. If you had reduced the butterfat content without talking to [6221] A&P, would that have been consistent with the offer you were making in Exhibit 50?

Mr. Mathias: I object. It is highly speculative and irrelevant.

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Judge Hinkes: It is speculative, but I will allow him to answer it.

Mr. McInerney: Would you like the question read back?

The Witness: Yes.

Judge Hinkes: The question was whether it would be consistent with Bowman's policy.

(The pending question was read by the Reporter.)

The Witness: No, it would not have been consistent.

By Mr. McInerney:

Q. You told us Mr. Schmidt said from the outset he wanted Bowman to quote prices which would result in a profit. Do you recall that? A. I do, yes.

Q. Did he tell you why A&P would care whether or not Bowman made a profit? A. I don't recall that we really discussed it in that kind of detail.

Q. Do you have any idea as a result of your previous deals with A&P as well as others why A&P would care whether or not Bowman made a profit?

【6222】 Mr. Mathias: I object, Your Honor.

Judge Hinkes: I will sustain the objection. That is going a little too far.

By Mr. McInerney:

Q. Has anyone from A&P ever communicated to you the interest of the company in having its suppliers make a profit? A. Yes.

Q. Who was that and would you tell us generally what was said? A. Yes, I can go back to many buyers that discussed it, Mr. Harshbarger was one, before him, Mr. Brick Carter.

Q. What was their position with respect to that?

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Mr. Mathias: I will object to this line of questioning as not being proper redirect. There was nothing of this gone into on cross.

Mr. McInerney: There was something on profit as I recall it.

Mr. Mathias: We straightened out one figure and that hardly goes into this line.

Judge Hinkes: That is correct. This is along the same line you questioned your witness on direct examination, Mr. McInerney. I don't think it is proper redirect.

By Mr. McInerney:

Q. In your discussions with Mr. Schmidt about the mark-up that Bowman was adding in this Exhibit 50 to which we have been referring, you told him that that would include a profit, as I [6223] recall; is that correct? A. I did, yes.

Q. Mr. Mathias showed you Commission Exhibit 50, which has the same page as A&P Exhibit 50. In Commission Exhibit 50, the page is I and in A&P exhibit, the page is G. He called your attention to a notation made by Mr. Schmidt with an asterisk to the mark-up column and then the asterisk, the footnote reads "Overhead and profit approximately 6 percent."

Is that notation in any way inconsistent with what you told Mr. Schmidt with respect to your profit? A. I don't believe it is.

Q. Mr. Mathias asked you if Mr. Schmidt had asked you if this offer, Exhibit 50, would be made available to competitors and you said that he had. He much later asked what you said about that and you said that it would be, you told Mr. Schmidt it would be, but that you didn't specify the price, as I recall your testimony? A. That is correct, sir, yes.

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Q. In fact, however, had you not previously decided within the Bowman organization that if A&P had accepted this offer that it would have been made available on the same terms to Kroeger and High-Low? A. We had decided that, yes.

* * * * *

【6227】 and the competitive offer and that the other offer was being accepted, did you offer to reduce the butterfat content in your milk and give a lower price? A. No, sir, we were not given any further opportunity to make any more bids or any more offers to the Tea Company.

Q. Did you make any protest to Mr. Schmidt that you could shave your butterfat content and give him a better price? A. No, I did not. I was not aware that was a bone of contention at the time.

Q. Mr. Cannon, why did you offer 3.5 percent milk to A&P? A. Going back into the history of when we served them before, Mr. Mathias, we used the same policy that we had served them before, because we had been given no specifications by the Tea Company.

Judge Hinkes: Is there anything else, Mr. Mathias?

Mr. Mathias: One moment, sir, there may be. No further questions, Your Honor.

Mr. McInerney: No further questions.

Judge Hinkes: You may step down, Mr. Cannon.

(Witness excused.)

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Testimony of Robert Abrahms
March 20, 1974

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【6385】 * * *

Q. I show you a document marked Respondent A&P Exhibit 63, for identification, and ask you if you can identify that document for us, sir? A. Also, with the variance at the bottom, it would have been for Westchester and Upstate New York-Albany area.

Q. I show you RAPX 64, for identification, and ask you if you can identify that area for us? A. That would have been for delivery to Boston.

Q. Would these have been proposals that were made to Hershel Smith? A. Yes, they were.

Q. I notice Respondent's A&P Exhibit 62, is dated May 1964. Would that proposal have been submitted to him at or about that time? A. Yes, it would.

Q. Respondent A&P Exhibit 63 is dated May 1964. Would that proposal have been submitted to Hershel Smith at or about that time? A. Yes, it would.

Q. Finally, Respondent A&P Exhibit 64, entitled Milk Formula 1965 (April), would it have been submitted to Hershel Smith at or about April of 1965? A. Yes, it would.

【6386】 Q. Did you discuss each of these proposals with Hershel Smith at or about the time they were given to him? A. Yes, I did.

Q. And did these proposals provide for delivery to the A&P stores in the area that you have mentioned?

Mr. Mathias: Your Honor, before we question the witness about documents that have not been offered in evidence, are these documents to be offered in evidence?

Mr. Curnin: To simplify it, we offer them, now.

Testimony of Robert Abrahms

Mr. Mathias: Before they are received in evidence, Complaint Counsel would like some voir dire.

Judge Hinkes: Very well.

Voir Dire Examination by Mr. Mathias:

Q. Mr. Abrahms, referring particularly to RAPX Exhibit 63, I note that there is some writing at the bottom of that page. The last printed matter ends with a line "Total Platform price". There is some handwriting that appears there. Is that your handwriting, Mr. Abrahms? A. No.

Q. Do you know whose it is? A. It would be my fathers.

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【6397】 * * *

By Mr. Curnin:

Q. Now, did you discuss with Mr. Smith the price advantage the price benefit that he would receive with that type of delivery service? A. Yes, we did.

Q. Would you tell us what that conversation was? A. We had a missionary sales job to do here because this was just at the changeover from full service, which was the accepted rule, to a limited service, which is today the accepted rule, and A&P had full service in all of the areas in which we were contemplating delivery and the store personnel and the supervisory personnel felt they needed the full service and we had to try to convince Mr. Smith that it was not necessary and the savings that he would accrue by having limited service would more than offset the new problems at store level by not having it, and it was to A&P's benefit to save the money and to go into this sort of an arrangement.

Q. During your discussions with Mr. Smith in connection with the proposals that have been marked Respondent A&P Exhibits 62, 63 and 64, did you discuss with him any particular pricing formula that you used in establishing your price to A&P? 【6398】 A. We had always bought

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milk before on just so much a quart—you know, 20 cents, 22 cents, whatever the price was. Our proposal to him had to move based on the Government announced price for milk, and as a result we set up a formula we would charge him so much a quart over the Government announced price for milk, because we could not, on the pricing we were quoting, we could not afford to absorb any future increases.

Q. What was that amount above the raw milk costs that you discussed with Mr. Smith? A. Approximately 6 cents a quart above the raw milk cost is what we had suggested the milk should cost delivered to the store.

Q. Did you break down for him your costs within that 6 cents a quart? A. Yes. I think the price sheets are fairly well detailed as to a real breakdown as to those costs.

Q. Would you tell us the pricing formula that you did discuss with Mr. Smith and how much you would add for your costs? A. Well, we had discussions with Mr. Smith, even subsequent to this period, verbal discussions, but basically, what I believe we had proposed originally, which has now since been slightly modified, is what, at that time, my father called the 2-2-2 formula.

【6399】 Q. Would you tell us your conversation with Mr. Smith about the 2-2-2 formula? A. Again, that 2-2-2 formula is basically just a reference area from which to work. It was not a refined breakdown. Those formulas are more refined breakdown, but basically, what it was, was that the carton, at that time, in New York City, was, basically, a Canco Cargon, which cost 2 cents, and that the delivery was usually estimated—we also estimated it at approximately 2 cents, and we figured the plant costs and plant profit at approximately 2 cents, and that is how we arrived at the 6 cent figure.

Q. That was part of your discussion with Hershel Smith? A. Yes, it was.

Testimony of Robert Abrahms

Judge Hinkes: When you speak of delivery, what delivery are you referring to?

The Witness: The delivery from the plant into the store. In some cases it had to go through a depot and in some cases it could go directly, depending on the distance from the store to the plant.

Judge Hinkes: Was this the formula for the private label?

The Witness: It was basically our formula for the private label.

Judge Hinkes: I thought you said you couldn't make **【6400】** delivery—someone else had to do that?

The Witness: That is correct. We made arrangements with truckers charging approximately a penny and a half to 2 cents, depending on the volume.

Judge Hinkes: Charging whom?

The Witness: The store.

Judge Hinkes: Why do you add 2 cents on for delivery if the store is going to be paying that?

The Witness: The store was always interested in knowing what his total price would be and we had to provide him with the name of a trucker who would be willing to deliver at approximately that price.

Judge Hinkes: Actually, your price would be 2 cents less than the price quoted, and he would have to pay delivery. Isn't that right?

The Witness: He would pay the trucker 2 cents.

Judge Hinkes: It may be 2 cents. It would be maybe less or more?

The Witness: We based it on what the truckers were currently charging our other customers.

Judge Hinkes: But that was no assurance. Is that correct?

The Witness: It was no assurance other than basic business practice, what we know the current business **【6401】** practice was.

Testimony of Robert Abrahms

Judge Hinkes: I don't quite understand—if you are going to charge 6 cents over the raw milk cost, and that includes 2 cents that you were not paying, but you expected the customer to pay, then your price is really not 6 cents over the milk cost, only 4 cents over the raw milk cost, and the customer will assume whatever risk he has to assume to get delivery?

The Witness: That is correct except, can I add one thing?

Judge Hinkes: Yes.

The Witness: Before we made any proposal to any additional chain or any additional store, we had always checked with the existing trucking companies in the area to see if any were interested in delivering to that store at approximately that price, or we would have been foolish approaching a store if we were not in a position to have the milk delivered.

Judge Hinkes: I don't question your good faith in giving him an idea what they were going to have to pay—all I am saying is you weren't really charging 6 cents over your raw milk price?

The Witness: That is correct.

By Mr. Curnin:

Q. As I understand it here, Mr. Abrahms, and I think it [6402] has been clear all along—what you were doing, in your discussions, you were quoting a total price, because that is what the store wanted to know, what it would cost them to get the milk into their stores? A. That is correct.

Q. And included within that cost was so much for processing and profit and containers, which would be your cost, and so much for delivery, which was based upon existing practice, and your own inquiry of truckers as to their availability to deliver the product? A. That is correct.

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Q. Did you have any discussions with Mr. Smith concerning the question of whether or not this pricing formula, which you have described for us, could be used in markets outside of New York?

Mr. Mathias: Your Honor, I am going to object to the expertise of this witness as to where this formula could be applied.

Mr. Curnin: That is an improper objection, Your Honor, as to this question.

Judge Hinkes: I think I must allow it—simply—whether or not he has any expertise—he is being asked whether he had any discussions, and I am not necessarily being asked to accept his expert opinion on the subject. I think the question may be answered.

【6403】 Mr. Curnin: Repeat the question for the witness please.

(The pending question was read by the reporter).

The Witness: We did have lengthy discussions as to the application of this basic formula to other areas, and we told him that he had to be very careful in arriving at the Government raw milk price because, in some cases there were not Federal Orders with which to work off, where the price was very clearly posted, and in some order the price was quoted f.o.b. the city, and some orders it was quoted f.o.b. 200, like in New York, it is quoted f.o.b. 200 miles from the city, so he had to first establish very clearly what the raw milk cost was, because in all cases it was not as easy to determine as it was in New York.

Secondly, we told him as far as we knew, the Caneo prices were similar all over, because we had some dealings with Caneo in some other areas and we were aware their pricing was basically the same

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all over because their price sheets said it was applicable in all of the states east of the Continental Divide, and as far as the processing and delivery, we told him naturally it would have to be adjusted for the differences between our labor rates and the labor rates in the area in which he was quoting and we gave him, I believe, at that time, even detailed figures as to what we figured the labor portion of each of [6404] these segments was and we said, with an Accountant looking at the figures, he could then adjust them for whatever area of the country he then wanted to apply them to.

Mr. Curnin: When you say he could adjust it, you mean with the adjustments you pointed out he could apply his pricing formula in other areas?

We thought so, yes.

Judge Hinkes: What about delivery?

The Witness: We told him what portion of the delivery was the labor part of it and what was the truck part of it and he would have to adjust, based on what we told him, at that time was our labor cost in the delivery, and he would have to adjust it based on the labor rate, whatever other area he went into.

Judge Hinkes: Is this any kind of formula, really. All you are saying is the seller is going to have to calculate his costs and arrive at a price. What formula is involved here?

The Witness: The formula that was involved was, prior to this time milk was never quoted so much over the Government price. Today, it is the established method of buying milk.

Judge Hinkes: That, I can understand. What you are saying is a seller will have to make a bid on costs over raw milk?

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【6405】 The Witness: At that time, whenever you went into a chain, they asked you what your price was. Many times it didn't change with the Government price because a lot of the dairies estimated what the price was going to be for the year and gave them that price.

Judge Hinkes: I understand your testimony. Apparently, what you are saying is that 6 cents is not necessarily the formula that everyone can use?

The Witness: It is a basis for starting to figure out plus and minus.

Judge Hinkes: Very well.

The Witness: That is correct. It was a basis. At that time, the chains had no idea whether it was 6 cents, 12 cents, 14 cents. It was never even discussed. Most of them didn't even know what the raw milk was costing.

Judge Hinkes: Aside from raw milk, I am speaking now of the override of 6 cents that you used?

The Witness: That is correct.

Judge Hinkes: That 6 cents is not necessarily applicable to any other dairy—necessarily, I say?

The Witness: Most of it—a lot of it is, yes.

Judge Hinkes: When you say a lot of it is, what do you mean?

The Witness: The carton cost certainly is.

Judge Hinkes: 2 cents is?

【6406】 The Witness: Yes.

Judge Hinkes: What about the rest?

The Witness: Most of the large companies, the cost of processing, the delivery, within reason, has to be similar for competitive reasons. There is no secret today what everyone's costs are, basically.

Judge Hinkes: All I am saying is your 2 cents, for example, for delivery, is not necessarily applicable

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to Chicago where the distances may be entirely different, where the terrain may be entirely different, where labor rates may be entirely different?

The Witness: We suggested to Mr. Smith he had to take into consideration the labor rate, the difference in the labor rate.

Judge Hinkes: Okay. All I am saying is the 2 cents used is not necessarily applicable to any other dairy, except you, where you have experienced it. Is that correct?

Mr. Curnin: I would object to the question.

Judge Hinkes: For what reason?

Mr. Curnin: I think the witness's testimony here, Your Honor, which has been gone into at some length by Complaint Counsel, myself, and Your Honor, is quite clear.

Judge Hinkes: Unfortunately it isn't clear to me and that is very important.

【6407】 Mr. Curnin: I certainly want the record to be crystal clear, Your Honor, but as I listen to the questioning, we seem to be getting away from what was the substantive discussion between the witness and Hershel Smith, what this witness's views were on the subject, and what those views were as communicated to Hershel Smith.

Judge Hinkes: Let me make myself clear. The witness has testified that he discussed with Mr. Smith the use of a formula and the formula that was advanced was a certain cents per quart over raw milk costs. The cents used by this particular dairy, in talking to Mr. Smith, was 6. Divided up 2 cents for cartons, 2 cents for delivery, and 2 cents for plant costs and profit, and now, as I understand the testimony of the witness, he also told Mr. Smith that that formula was also useable elsewhere, and that is

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where we get down to the nitty-gritty. I want to know if that formula was really contemplated for Chicago, and that is what we are interested in, not really New York.

Now, apparently, it was contemplated, and I want to know exactly what was contemplated. Was the figure 6 cents contemplated or was merely a cost or a price overriding the raw milk contemplated, and that price or cost to be calculated by the dairy involved recognizing differences in costs from one dairy to the next.

【6408】 Mr. Curnin: Isn't the question here, Your Honor, what discussions and what information was exchanged between this witness and Hershel Smith?

Judge Hinkes: Exactly, and I say when he said to Mr. Smith—this formula can be used—what exactly was meant? Was it a formula of 6 cents per quart over raw milk costs or was it simply costs over raw milk to be determined by the dairy which may or may not be 6 cents?

Mr. Curnin: I think I heard the witness's testimony Your Honor, and I thought he went into some detail as to just what it was he told Hershel Smith was the way to use this formula, as a reasonable basis or bench mark for determining costs in other jurisdictions, but the record will certainly tell us as to the substance of that conversation.

Judge Hinkes: I am not satisfied the record is that complete, and that is the reason for my questioning this witness, and it is important to understand what the record is showing. You may have a very good impression of what the record shows, better than I do. I don't question that, but unless I am so satisfied, it is incumbent upon me to be sure the record does make that clear.

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Mr. Curnin: I don't disagree with that but I am suggesting, and that is all it is just a suggestion, that the clarification, if it need be, should be in terms of what [6409] the conversation was between this witness and Mr. Smith.

Judge Hinkes: I agree with you. I want to be sure I know exactly what was said. That is what I am asking him—were you talking about any dairy can use 6 cents over raw milk when you spoke to Mr. Smith, or were you talking about any dairy could use its costs over raw milk which may or may not be 6 cents? That is my question and I think the witness ought to be able to answer that.

The Witness: What we told Mr. Smith is that any well run dairy should be able to work off the 6 cent formula adjusted to the local labor rates.

Judge Hinkes: Only labor?

The Witness: We thought, at that time, that labor was the only factor of any significance which really varied. Naturally, a tremendous variance, also covered with Mr. Smith, would have been the size of the drop at the A&P stores. We had told them how many units a store had to use, and so long as it was similar between areas, there was no problem.

Judge Hinkes: How about plant costs?

The Witness: The plant costs, basically, should be the same except for labor, depending on area of the country there is no great difference.

Judge Hinkes: You think their efficiency is the same?

[6410] The Witness: Of every particular plant?

Judge Hinkes: Yes.

The Witness: Absolutely not.

Judge Hinkes: Then, how can their plant costs be the same?

Testimony of Robert Abrahms

The Witness: I said in any area, the efficient plants all have similar costs.

Judge Hinkes: Regardless of the age of the equipment?

The Witness: No, I said the efficient plants.

Mr. Curnin: May I interrupt here, so the record will be clear. Is this an inquiry as to—that Your Honor is seeking to determine as to the reasonableness of the formula as this witness views it, as separate and distinct from conversations he had with Hershel Smith?

Judge Hinkes: Oh, no. I am still trying to get exactly what he told Mr. Smith, and to the extent that his answer appears to be—what shall I say—open to different constructions, I am exploring that to be sure I understand which one of these constructions was conveyed to Mr. Smith.

Mr. Curnin: That is where I have my problem. I don't think the record here is clear on that subject at all. The record seems to me to be very clear as to the discussion he had with Hershel Smith, and I believe Your [6411] Honor is asking questions as to what Your Honor feels may be concerning the reasonableness or soundness of the formula as applied or used or enunciated, but that is something, or may be something separate and distinct from conversations with Hershel Smith. That is the only point I make, Your Honor.

Judge Hinkes: Perhaps, I have covered this sufficiently. I don't want to belabor it any further. Perhaps we can go on then. You may continue.

Mr. Curnin: I am thinking, now, in terms of the questions that you asked, Your Honor, about this witness, and this particular pricing formula.

Testimony of Robert Abrahms

In regard to this pricing formula, Mr. Abrahms, 2-2-2 pricing formula, call it what you will—did you or your father originate this pricing formula?

The Witness: I don't believe so.

Mr. Curnin: Well, was it something that was known—

Mr. Mathias: Your Honor, I believe now we are going beyond the discussion between Mr. Smith and Mr. Abrahms.

Mr. Curnin: I believe we have been beyond that for some time.

Mr. Mathias: And the proposed testimony here and I believe it is irrelevant.

【6412】 Judge Hinkes: Mr. Curnin, you objected continuously to what you believed was my going beyond. I don't believe, now, it is quite proper for you to engage in that particular inquiry, having insisted I should not.

Mr. Curnin: I don't think any statement of mine, Your Honor, could be one that would be characterized as insistence that Your Honor not proceed. Obviously, Your Honor would not permit me to direct Your Honor's questioning.

Judge Hinkes: I think the language used was actually, you object, which is even worse. The point of the matter is, do we want to go into this beyond the discussions? I ask you that question, Mr. Curnin, having asked me that.

Mr. Curnin: The only point is, assuming Your Honor has had direct, I suppose I am entitled to a limited cross on the subject. It seems to me there is some question in Your Honor's mind about the formula and its application or possibly its creation, and as I was trying to simulate Your Honor's questions, and it is to this limited area I wish to address

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a few questions to the witness. I think it might be helpful to Your Honor.

Mr. Mathias: Your Honor, I am going to have to object as being beyond the relevancy of the issues in this case, beyond the scope of the examination proposed for this witness. If we are going to get into philosophical discussions about the dairy industry with this witness, in [6413] Albany, New York, or other parts of the country, this examination can be practically endless. I don't see why it can be fruitful. A&P has prescribed itself in the examination of this witness by its stated purpose for calling the witness as:

"To testify to his discussions with A&P on private label milk and dairy products and the duration of arrangements for the supply of milk and dairy products", and I object to this line of questioning.

Judge Hinkes: I must sustain the objection. Did you discuss with Mr. Smith the origin of the 2-2-2 formula?

The Witness: Between my father and myself, we probably had 200 hours of discussions with Mr. Smith. They were very long, very laborious, and we were very interested at this time in selling A&P because it represented 200 times what our current volume was. There was a tremendous amount of time spent trying to educate Mr. Smith, in connecting into this sort of arrangement, and we did discuss with Mr. Smith, in detail, the different type of arrangements that some of the other national chains had at the time and the reason this 2-2-2, the reason that the split came about, is because another large competitor in the New York market was Safeway stores out of California, and Safeway at that time was about the only chain store in the country, I knew

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【6414】 of, that had their own milk plant. In the New York area, they had come to us, that they wanted to use our plant, but they wanted to supply their own milk, wanted to supply their own cartons—

Judge Hinkes: This, all, you talked to Mr. Smith about?

The Witness: That is right. We were trying to show him the type of other arrangements the chains were making.

Judge Hinkes: Remember, all I want to know now is what you talked to Mr. Smith about?

The Witness: Yes. This was discussed with Mr. Smith. We also discussed with him the Bohack arrangement in New York; the Bohack Safeway arrangement in New York was where they wanted to supply the milk, they wanted to supply the cartons, and they wanted to do their own delivery, and they only wanted us to do the pasteurizing and the processing. So we had to establish with Safeway a price for that function. The wind up of the Safeway situation was we did not get the business, that the business went to another New York dealer, and Safeway supplied the cartons and did their own delivery under their own name, and the dealer in New York supplied the milk and processed the milk.

Judge Hinkes: This, too, you told Mr. Smith?

The Witness: Yes. He was aware.

【6415】 Judge Hinkes: No. Did you tell this to Mr. Smith?

The Witness: Yes. We had lengthy discussions with Mr. Smith about the Safeway situation.

Judge Hinkes: About Safeway's business going to someone else?

The Witness: That is right, and about Safeway's general conduct of their business because we were

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trying to use them as an example of why A&P should go into private label because Safeway was in what we called a captive label. They had their own company—they called it Lucerne Milk Company, and the milk was sold under Lucerne brand. We were trying to use Safeway as an example where they were building their own plants and going into their own delivery. We were trying to say he should use us to do his processing and providing the raw milk, and do what Safeway did—furnish his own cartons and do his own delivery. That is why the split came about, Your Honor, because we were trying to break out, for him, what his costs would be if he did different segments of the operation.

Judge Hinkes: But coming back to the original question, in your discussions with Mr. Smith, did you talk to him about the origin of the 2-2-2 split?

The Witness: Yes.

Judge Hinkes: What was the origin?

【6416】 The Witness: As far as we were concerned, the basic origin was the type of arrangement that Safeway was making with the different areas. We frankly had never heard of it before that, until Safeway came along and approached us, and asked us if we would be willing to just do the processing—they would give us 2 cents a quart to do the processing, and they would be willing to do their own delivery and furnish their own cartons.

Judge Hinkes: That was 2 cents. Right.

The Witness: That is right.

Judge Hinkes: I am talking about the 6 cent formula?

The Witness: Or they said they would also be willing to let us buy the carton and give us the 2 cents, but they preferred to buy it themselves be-

Testimony of Robert Abrahms

cause they felt they could buy it from the American Canco cheaper, because of their volume.

Judge Hinkes: The other 2 cents was—

The Witness: What they told us they had estimated their delivery would run, approximately, and what it was running, I believe, at that time, in the Washington—I believe the fellow that came to see us was the fellow running the Washington area. I know he told us that is approximately what his Washington delivery was running. That is how this all evolved, was from Safeway.

【6417】 Judge Hinkes: I see. Very well.

By Mr. Curnin:

Q. Mr. Abrahms, what was the duration of your milk supply arrangements with stores in the period 1965 to 1970? A. Our only arrangement is that on any of our large customers, we would appreciate it if they would give us ample notice because of the raw milk supply, but basically, they are under no legal obligation to do so and we have lost customers on as little as 14 days notice.

Q. No further questions.

Mr. Mathias: I don't believe we have extensive cross, but we do have a few questions, and I believe everybody is a little tired and hungry at this point.

Mr. Curnin: I believe this may be an imposition on the lawyers and what not, but Mr. Abrahms is on vacation and he has other plans and arrangements. I realize the importance of the proceeding and what not, but if, in fact, complaint counsel's cross would only be a few questions, and then I would ask the indulgence of the court and complaint counsel if we could take a 5 minute recess and come back—it may well be we will be through at 1:30.

Testimony of Robert Abrahms

Judge Hinkes: Only if I can be assured it wouldn't be longer than 1:30. I don't think I would be warranted in going beyond that point for everyone's sake here.

【6418】 Mr. Mathias: I can't be sure I will be finished by that time but I don't know that I won't be, either.

Judge Hinkes: I do think, under the circumstances, we better take our lunch recess, at this time. I think that we can be back by 2:00, and hopefully complete the witness's testimony before too long, but from previous experience, I have found very unlikely conclusion to assume that we can finish with any witness within 30 minutes or less. There is no assurance, and then to take a lunch recess, at say, 1:30, is a little too much. I think we better stop now. I am sorry if we inconvenience you.

The Witness: The only problem is the last plane to where I am going to is 2:30.

Judge Hinkes: Leaves at 2:30? That is rough.

The Witness: Could we try and see if at 1:30, we are finished? If not, then we could break for lunch.

Mr. Mathias: I would hate to inconvenience Mr. Abrahms. If we take a few minutes break, possibly we can finish by 1:30 or quarter of 2, and take a late lunch. I am willing to try it.

Mr. Curnin: We appreciate it, Your Honor.

Judge Hinkes: All right. Let's take a short recess.

(Whereupon, at 1:00 p.m., a recess was taken until 1:05 p.m.).

【6419】 Judge Hinkes: On the record. You may cross examine.

Testimony of Robert Abrahms

Cross Examination by Mr. Mathias:

Q. Now, Mr. Abrahms, this 2-2-2 formula that you discussed was basically based upon your costs at that time period. Is that not correct, sir? A. Basically. Correct.

Q. And for the area in which you were doing business. Is that correct, sir? A. Only that we had discussed, Mr. Mathias, with Safeway, and the fellow we had discussed it with in detail in Safeway, was running their Fort Worth plant, and one was running their Washington operation, and they came to Eltonville on a couple of occasions, because they were very serious about having us do their work or even contemplating buying our facility, at the time.

Q. Were you familiar with the Safeway method of operation in either Washington or the other area you mentioned? A. Yes.

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Testimony of Robert G. Havemeyer

March 26, May 14, 23, 28, 1974

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【6775】 * * *

I was the principal speaker at the only seminar devoted to pricing, public seminar devoted to public pricing in the dairy industry in Chicago. I was on for a day and a half and another speaker for about a day and a half, as I recall. I have spoken at two seminars conducted by the Milk Industry Foundation on the subject of data processing.

I have appeared before and delivered a talk to an annual convention of the International Association of Milk Control Agencies, which is the association of state milk commissions.

I am on the faculty—this is beyond the dairy industry—but I am on the faculty of the American Management Association, I lecture on cost analysis, financial control, distribution analysis, subjects of that nature.

Q. To what extent has your professional career been devoted to cost accounting in the dairy industry? A. Since 1955 very largely devoted to that industry.

Q. Other than the reference to the American Management Association, are you associated with any other professional association? A. Yes, I am a member of the Institute of Management Consultants and I was one of the founding members of that organization.

Q. Did you at our request make a study comparing Bowman Quotation, marked CX 50, of August 1965 for A&P with Borden Quotation on Milk and Dairy Products, marked CX-62? **【6776】** A. Yes, I have.

Q. Have you prepared a chart at our request illustrating the results of that study? A. Yes, I have.

Mr. Falls: Your Honor, I would like to have marked as A&P Exhibit 100 a single-sheet exhibit

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entitled "Comparison of Bowman, CX 50, and Borden, CX-62 (Borden Zone 1).

(The document referred to was marked A&P Exhibit No. 100 for identification.)

Mr. Mathias: Could we have a few minutes' break to xerox a few copies of the revised papers we received yesterday afternoon. I would like my accounting experts to be able to follow this and we have only the one copy.

Judge Hinkes: Yes, I think we had better do that. This is a revised 100?

Mr. Mathias: They are underlying documents for 100. I don't know whether 100 itself has been revised or not.

Mr. Falls: No, it has not. We have no objection to that.

Judge Hinkes: We will take a short recess so you can xerox those copies.

(Whereupon, a brief recess was taken.)

Judge Hinkes: You may proceed, Mr. Falls.

By Mr. Falls:

Q. Let me hand you the document which has been marked RAPX [6777] 100 and ask you if that is a copy of the chart which you say you had prepared where you compared the Bowman and Borden quotes. A. Yes, it is.

Q. What underlying documents did you examine in order to secure the data necessary for these calculations? A. We relied upon CX 62, CX 50, CX 36, CX 42, CX 56. We also relied upon page 7 of a procedure outline prepared by the Borden Company, which I believe is A&P Exhibit 66 in this hearing. We relied upon a Borden internal document for its Region 7, which I think is A&P Exhibit 73, and we relied upon Borden summary billings to A&P stores in May and September 1965.

Testimony of Robert G. Havemeyer

Q. Mr. Havemeyer, and let me point out, Your Honor, we now have up on the easel a copy which I believe to be an identical copy of RAPX Exhibit 100. The title of A&P Exhibit 100 indicates it relates to Borden's Zone 1, is that correct? A. That is correct.

Q. That is a comparison of the quotes as they relate to Borden Zone 1. A. Yes, sir.

Q. Approximately what percentage of A&P sales were in Zone 1? A. Approximately 75 percent.

Q. Turning first to the figure of \$2,521,294.96, which appears at the top of the first column on A&P Exhibit 100, would you explain what that figure represents and perhaps at this [6778] point you could use the large copy of the exhibit mounted on the easel. A. This figure represents the price A&P would have paid Borden under the prices quoted in CX 62, based upon the annual quantities listed in CX 62 in Borden's Zone 1 for homogenized milk in paper container in three sizes—quarts, half-gallons and gallons with an adjustment, an adjustment being an adjustment in the price of raw milk.

Q. Would you explain what that adjustment was made and how it was made? A. In Borden's quotation the prices quoted in CX 62 were based upon a raw milk price of \$4.29 per hundredweight. Borden included a provision to change the quoted price depending upon changes in the price of the raw milk. We used the methodology in the table which is laid out in CX 62.

Q. To adjust for what raw milk price as opposed to \$4.29? A. A price of \$4.32 because the Bowman price was based upon a raw milk price of \$4.32. To make a valid comparison between two quotations, we made use of this adjustment which was a feature of the Borden quotation.

Q. If I understand you, the Borden price as adjusted was based on \$4.32 per hundredweight, as was the Bowman price? A. That's right.

Q. From what source was the annual quantities A&P's

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purchases determined in connection with the calculation of this [6779] figure of \$2,521,294.96? A. These annual quantities for Borden Zone 1 are laid out and stated specifically in CX 62 for Zone 1.

Q. Again referring to the raw milk price adjustment of, to make a conversion from \$4.29 to \$4.32, you mentioned that this was taken from the Borden quotation. Can you identify the particular schedule involved? You can go back to your seat and locate the exhibit, if you wish. A. In CX 62, pages N and O, the change is shown in the price for a quart, half-gallon and gallon package of milk for each penny change in the hundredweight price.

Q. So you directly applied that schedule in making the adjustment you have described? A. That's right.

Q. Mr. Havemeyer, let me direct your attention to the second figure in the first column, which is \$25,345.75. Let me ask you what that represents. A. This represents an adjustment for a value of one-tenth percent in butterfat being the butterfat level in the homogenized milk. The reason for this is the Borden quotation was based upon a butterfat content of 3.4 percent and Bowman's quotation was based upon a butterfat content of 3.5 percent, and Borden's CX 62 showed how such an adjustment would be made.

Q. Again you used the methodology described in the Borden Exhibit CX 62 in making that adjustment? [6780] A. That's right.

Q. Could you identify where that schedule is to be found? A. CX 62, page X, entitled "Formula Price for Raw Milk."

Q. So that the butterfat adjustment you just described amounted to \$25,345.75? A. That is correct.

Q. Do I understand the following figure, \$2,546,640.71, represents the Borden quoted price on the homogenized milk in paper containers after both the raw milk and the butterfat adjustment? A. That's right.

Q. Could you next turn to the figure of \$2,514,530.13,

Testimony of Robert G. Havemeyer

which is the first figure in the second column, and tell us what that represents and how it was determined. A. That represents the price that the A&P Company would have paid to Bowman had it accepted Bowman's prices as laid in CX 50. That is based upon the—

Q. This is for the same products? A. For the same products of quarts, half-gallons and gallons of homogenized milk in paper containers using the same quantities specified in Borden's CX 62, this includes an adjustment.

Q. Would you tell us generally the nature of that adjustment? A. The two quotations were presented in five geographic areas called zones and they did not coincide. We made an adjustment to put Borden's Zone 1 on a comparable geographic area with [6781] Bowman's quotation. So, the prices would reflect the same areas.

Q. Have you at our request prepared a series of charts to illustrate the geographical difference to which you have just referred? A. Yes, charts like this have been prepared.

Mr. Falls: I would like to have these charts marked A&P Exhibit 101-A, B and C.

(The documents referred to were marked A&P Exhibits 101-A through 101-C for identification.)

By Mr. Falls:

Q. Mr. Havemeyer, we have put up on the easel here the document which has been marked as A&P Exhibit 101-A. This is a chart you prepared, is that right? A. That's right.

Q. Would you explain what it shows? A. This shows the location of towns in which A&P had stores or at least those towns which were identified in both the Bowman and Borden quotations as to where A&P had stores to be served under the private label bids. It is coded first in color with Bowman being red and Borden being blue. It

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is further coded as to the shape of the symbol to indicate the frequency of delivery which was indicated in the quotations.

Simply, in the case of Bowman as in the case of Borden a round circle, solid circle, indicates that six-times-per-week **[6782]** delivery was anticipated.

A solid square, either red or blue, indicates that three-times-per-week delivery was anticipated.

A square which is white in the center and that is blue indicates Borden anticipation of five-times-per-week delivery. Although Borden had made notations about four-times-per-week delivery in its bid, it actually identified no stores where there were to be four-times-per-week delivery, so you will not find there any of the blue squares which are half-shaded and half-white.

Q. Let's turn to A&P Exhibit 101-B and let me ask you to explain that one, Mr. Havemeyer. A. This is a photograph of the same map which you have previously looked at with an overlay on it; that is, all the symbols, dots and squares are identical to those seen on 101-A.

The red shaded areas indicate the zones as outlined in the Bowman quotation. The heavily shaded area, the solid shaded area, indicates it is Chicago metropolitan area.

Q. Is that Zone 1 or Area 1? A. It is Area 1 as indicated here by my pointer. Its so-called Area 2 could be described as Northwestern Illinois. Its Area 3, indicated by the slanted lines and as indicated here, could be described as North Central Illinois.

It called Area 4 with vertical stripes was its portion of Indiana and, finally, its Area 5 over on the West extends **[6783]** over into Iowa, but also includes parts of Illinois. So, these are the five areas or zones which have been specified in the Bowman quotation.

Q. Will you now turn to A&P Exhibit 101-C and explain what that shows? A. A&P Exhibit 101-C is a picture of the original map with the same indications of town loca-

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tions, with the same red shaded areas as shown on 101-B and with a second overlay of blue representing the zones which were described in Borden's quotation, CX 62. This gets a little more difficult to follow, but I will outline the areas. I am now talking about the blue outlined areas.

Borden's Zone 1 is that which has the small dots in it and you could generally describe it as the Chicago metropolitan area, but also including a section of the northwestern portion of Indiana. I will trace its outline with my pointer here. This goes over into Indiana, up to the lake and over to there.

Borden's Zone 2 was another part of Indiana, and I will trace that with my pointer.

Borden's Zone 3 is over here. It is this unusually shaped area coming over here as far West as Rockford, I believe it is, and down into Joliet.

Its Zone 4 was a peculiarly shaped area including a section of Indiana, North Central and a good portion of Northwestern Illinois up to the Wisconsin line.

【6784】 Zone 5 is over on the West including portions of Iowa and Illinois.

As we have been talking so far, we are focusing on Zone 1 Borden, which is generally its Chicago area and the northwestern portion of Indiana.

【6785】 Q. If I understand you, Mr. Havemeyer, the particular area that created the necessity for the geographical adjustment ~~you have referred to~~ was this small piece of Borden Zone 1 that extends over into northwest Indiana? A. That is right.

Q. In the part that we have just pointed to, this little piece of Borden zone that sticks over into Indiana, in what Bowman zone did that fall? A. That is in—if you would refer to Exhibit 101, that falls in Bowman Zone 4, its Indiana zone.

Q. Did Bowman quote to A&P a different price for its Zone 4 and its Zone 1? A. Yes, it did.

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Q. Is this the reason why some adjustment was necessary? A. That is right.

Q. Would you explain, Mr. Havemeyer, in a general way at least, how that adjustment was made—that is, the geographic adjustment with respect to this little piece over in northwest Indiana?

First, how many A&P stores were located in that particular segment? A. There were 15 A&P stores in this small segment in northwestern Indiana, and there were also 15 A&P stores in this Borden Zone 2 in Indiana.

Q. How many A&P stores were there in all of Borden's [6786] Zone 1? A. Something over 100.

Knowing that there 15 stores in that small section of northwestern Indiana as well as 15 stores in its Indiana Zone 2, we assume that the amount of fluid milk product as quoted under this bid would be about the same in both of those zones. On the basis of that, we made an adjustment.

Q. So you determined then the anticipated volume of sales of these 15 stores in the segment of northwest Indiana we have talked about? A. That is right.

Q. You applied to that volume of sales the Bowman Zone 4 price which was the applicable price? A. That is right.

Q. I think perhaps we can go back, Mr. Havemeyer, to A&P Exhibit 100, unless the Court would like some further explanation on the point at this stage.

Judge Hinkes: No; you may continue.

By Mr. Falls:

Q. If I understand your testimony, Mr. Havemeyer, the figure of \$2,514,530.13 represents the Bowman quote for the annual quantity of quarts, half-gallons, and gallons of homogenized milk in paper containers after having made

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the geographical adjustment which you have just described? A. That is right.

【6787】 Q. Would you tell us what \$32,110.58 represents, which is the second figure in the far right-hand column on A&P Exhibit 100? A. That is the difference in price under the Bowman and Borden quotations modified as described in the adjustments we have just talked about for raw-milk price, butterfat adjustment and geographic adjustment for the homogenized milk in paper containers, in quarts, half-gallons, and gallon sizes, and the fact that it is a positive number means that the A&P company would have paid \$32,110.58 less had it accepted the Bowman bid than had it accepted the Borden bid.

Q. For these products? A. For these products.

Q. Let me direct your attention next, Mr. Havemeyer, to the figure \$697,926.87, which is the fourth figure in the first column on A&P Exhibit 100, and ask you what that represents. A. This represents the price that the A&P Company would have paid to Borden for homogenized milk in glass gallon containers had it accepted the Borden quotation based upon quantities laid out in CX-56 and based upon billing prices which Borden was actually charging to A&P in the Chicago and suburbs area. The reason for this is that in CX-52 that container was withdrawn from the bid.

Q. Did you make the same raw-milk price adjustment in calculating that that you did in connection with the milk in paper 【6788】 containers or was that not necessary? A. Excuse me just a minute.

Yes, the same adjustment was made for the raw-milk prices.

Q. What does the number of \$6,242.45 represent? A. That represents, as for the milk in paper containers, the value of an additional tenth percent butterfat content to bring the homogenized milk in glass containers up to the

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same level of butterfat content as Bowman would have had in its quotation.

Q. What does the \$592,880.88 represent? A. This is the price that A&P would have paid to the Bowman Company under the price laid out in the Bowman quotation.

Q. That again includes the geographical adjustment that you described before? A. Yes, it does.

Q. What does the figure of \$111,288.44 represent? A. That is the difference between the figure for Borden of \$704,169.32 and the figure for the Bowman quotation of \$592,880.88. The fact that it is a positive figure means that A&P would have paid Bowman \$111,288.44 less than if it had accepted the Borden quotation.

Q. Let's turn to the next row of figures, beginning with \$3,250,810.03. Go along there and explain these figures. A. \$3,250,810.13 is the sum of the figure for just the homogenized milk in paper containers of \$2,546,640.71 and the figure for homogenized milk in glass gallon containers of **【6789】** \$704,169.32.

Similarly, under the Bowman column, the figure of \$2,107,411.01 is the sum of the Bowman quotation for homogenized milk in paper containers of \$2,514,530.13 and \$592,880.88, the latter representing the price A&P would have paid Bowman Company for milk in glass gallon containers.

These two figures which are on the line "Total cost of homogenized milk adjusted to 3 and a half percent butterfat" have their difference indicated in the right-hand column of \$143,399.02. The fact that it is a positive figure indicates that A&P would have paid the Bowman Company that much less had it accepted Bowman's quote than it would have paid the Borden Company.

Q. This applies to all homogenized milk, whether in paper or glass? A. That is right.

Q. Would you next turn your attention to the next series of items opposite the heading "8 other dairy items on which

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Borden offered private label"? A. Yes. In CX-62, Borden offered eight other items beyond the homogenized milk group in private label. When we went through the raw-milk price adjustment as described before, going from \$4.29 per hundredweight to \$4.32 per hundredweight and extending that modified price by the quantity set out in Borden's CX-62, we arrived at the figure of \$1,063,967.48.

【6790】 Similarly, when we applied Bowman's prices to those products and made the geographic adjustment that we described before, then we had, for Bowman, \$1,082,157.59. Their difference is \$18,190.11. The fact that it is indicated as a negative number means that A & P would have paid Bowman \$18,190.11 more if it had accepted the Bowman quotation than had it accepted Borden's quotation.

Q. Again, would you go through the same procedure, Mr. Havemeyer—let me ask you one question. On that particular comparison, was any butterfat adjustment necessary? A. No, there was no adjustment necessary.

Q. Going to the next line, which is "Total 11 items on which Borden offered private label, adjusted to 3 point 5 percent butterfat," explain what that shows. A. This is the sum of two figures. In the case of Borden, it is the sum of \$2,546,640.71, which is the price for homogenized milk in paper containers, three different sizes, and for the eight other items on which Borden offered the products in private label of \$1,063,967.48.

The corresponding figures were added in the Bowman column to give us a sum of \$3,596,687.72. The difference between the two figures on that line is \$13,920.47. The fact that it is a positive figure means that A and P would have paid Bowman \$13,920.47 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

【6791】 Q. This is a comparison of all of the 11 items which Borden offered in private label? A. That is right.

Q. And includes no others? A. That is right.

Q. Would you direct your attention next to the following

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line figures appearing opposite the heading "10 additional items offered by Bowman in private or Bowman label and by Borden in Borden label only"? A. Yes, sir. As indicated by the footnote, these 10 items include sour cream in pints and half-pints, pints of sour half-and-half, and so forth, expressly set out in Footnote 3. They were not offered by Borden in private label but only in the Borden label.

Borden did not have an annual estimate of the quantity of these items which would be purchased by A&P. Therefore, we do some proportioning to determine approximately how much of those 10 additional items would be purchased based upon some billing summaries.

When we took the actual prices which Borden had been charging A&P and multiplied by the quantities which I just mentioned, we came up with a price of \$692,850.94.

When we applied Bowman's prices to the corresponding products—and I use "corresponding" rather than "identical" because they were not identical; the Bowman would call them one [6792] way and Borden might call them another name, but as far as we could tell, they were the corresponding product—then we had a figure of \$597,160.62, and that figure also includes a geographic adjustment I just described.

Finally on that line, a figure of \$95,690.32 represents the difference between the Bowman and Borden quotations for these 10 additional items, and the fact that it is a positive number means that A&P would have paid Bowman \$95,690.32 less if it had accepted the Bowman quotation than if it had accepted the Borden quotation.

Q. You mentioned this question of annual quantities. I gather that the annual quantities for the preceding products were obtained from the Borden bids on private label where those annual quantities were set out? A. Yes, sir.

Q. Since these 10 products were not included in those bids, there was no such convenient source of the annual quantities? A. That is right.

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Q. So you had to derive those from Borden's actual billings? A. That is right.

Q. Would you turn, then, to the final line, in which the figures appearing opposite the total 22 fluid milk items— A. There is a figure under the Borden column of \$5,007,628.45. This is the sum of three figures. It is the price for all homogenized milk items of \$3,250,810.03 and the eight other **【6793】** dairy items on which Borden offered private label and, finally, these 10 additional items which Borden offered only in Borden label.

When we add the corresponding figures for Bowman, we find in the Bowman column, a figure of \$4,786,729.22, and the difference between those two totals in those two columns is \$220,899.23. The fact that it is a positive figure means that A&P would have paid Bowman that much less money for these 22 items if it had accepted the Bowman quote than if it had accepted the Borden quotation.

Q. So this is the difference in the quotes for all 22 items if A&P had taken all of them from Bowman instead of all of them from Borden? A. That is right.

Q. Mr. Havemeyer, were you able to compare in the same way the Borden and Bowman quotes for all zones? That is, this is a comparison with respect to Zone 1. Were you able to make the same comparison for all zones? A. No, we were not able to do that.

Q. Why was that? Should I put the maps back up? A. Yes, I think that would be helpful.

If I can direct your attention to this map, I want to emphasize the point that there is a lack of coincidence in these zones or in the boundaries. There is considerable overlap and there are pockets of overlap, if you will, where it **【6794】** might be Borden Zone 3 and Bowman Zone 2.

To be specific, for example, over here in a portion of central Illinois, north central Illinois, there is the Borden Zone Number 5, as indicated by this crosshatching. As

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indicated by the red crosshatching going in the other direction, it is Bowman's Area 3.

Now, just as there was an area of overlapping zones there and different shapes and sizes of overlapping areas or pocket of overlap in these other zones, gave us a problem. We did not have in any of the quotations specific quantities of each of the milk items, the 11 items, which would be sold in those zones or those subzones. We just did not know how much of these dairy products would be sold here in these queerly shaped zones and all these zones of overlap.

As you can see, there are quite a few zones of overlap and peculiarly shaped areas, no regularity to it, and we simply did not have quotations telling us what the quantities would be in the areas of overlap, as I call them.

Secondly, there was, in the Bowman quotation, a somewhat vague reference to an adjustment on raw-milk price, and I read from CX-50 on page 4: "In the event that stores are served in areas where there is no Federal milk order or where the superpool price is not effective, we will adjust the quoted prices in that area."

Finally, we did not have available to us, although we tried [6795] to get it, information in other areas beyond Chicago and suburbs which corresponded to the billing summaries which we were able to use in the case of prices for glass gallon containers and in the case of both prices and quantities which we used with respect to these 10 additional items offered by Borden in Borden label only. The information could not be developed beyond the billing summaries available for the Chicago and suburbs areas.

So, for these three reasons, we could not make this kind of analysis of this type in the other zones.

Mr. Falls: We are nearly finished with this exhibit. Could we have about a three-minute recess so I can see if there is anything else I have on this?

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Judge Hinkes: Yes. We will be in recess for a few minutes.

(A short recess was taken.)

Judge Hinkes: Mr. Falls.

Mr. Falls: I have just two more questions.

By Mr. Falls:

Q. I direct your attention to the next to the last heading from the bottom on A&P Exhibit 100, which reads: "10 additional items offered by Bowman in private or Bowman label and by Borden in Borden label only." Do you have any comment with respect to the accuracy of that heading?

A. Yes; the heading is slightly inaccurate, based upon my reading of Mr. Frank Cannon's testimony which I read in the **[6796]** last few days. As you can imagine, this was prepared some time prior to that. In Mr. Cannon's testimony, he said Bowman offered a few items in private label or Bowman label but that on the small-volume items they were going to be offered only in the Bowman label.

However, he also said that the price would remain the same, where there was the option, whether they took it in Bowman or private label.

So the heading is slightly inaccurate in that Bowman did not offer low-volume items in the private label, but the price did not change.

Q. But the price was not altered? A. The price is not altered.

Q. I believe, although I could be in error, that in your testimony with respect to the comparison of the Borden and Bowman quotes on glass gallons of homogenized milk —I believe you said a raw-milk price adjustment of the kind you describe was made in connection with that comparison. Is that correct? A. If I said that, that was wrong. There was no adjustment necessary for the raw-

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milk price on glass gallon containers, the reason being that this item was not quoted in CX-62 and, therefore, did not have the price adjustment to go along with it—more specifically, the price which we have used to develop the figure of \$697,926.87 based upon the actual price charged by Borden to A&P in the Chicago and suburbs area [6797] during 1965.

Q. In September of 1965? A. September of 1965, yes, sir.

Q. That price was based on a raw-milk price of \$4.32 per hundredweight? A. That is right.

Mr. Falls: I would like to offer into evidence A&P Exhibits 101-A, B, and C.

Mr. Mathias: Your Honor, may I have some *voir dire*?

Judge Hinkes: Very well.

Voir Dire by Mr. Mathias:

Q. Mr. Havemeyer, there were certain underlying computations made by you in connection with the preparation of Respondent A&P Exhibit 100 for identification, were there not, sir? A. Yes.

Mr. Falls: Let me have marked as A&P Exhibit 102 a multipage document which is entitled "Location of Indiana A&P Stores by Bowman and Borden Pricing Areas."

(The document referred to was marked Respondent A&P's Exhibit 102 for identification.)

Mr. Falls: We will mark as A&P Exhibit 103 a document consisting of four pages entitled, on the first page, "Price Adjustment Demonstration—Zone 1, Adjustment Prices (CX-62) from Raw Milk Price of \$4.29 Per Cwt. to Raw Milk Price * * *

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【8658】 Q. Would you refer us to the pages which would show it? A. Please pull out pages 23 and 24. There is one other page, pages 11 and 12. If you will keep your fingers in those pages. So we are going to refer to pages 11, 12, 23 and 24, and only in the case of Wilco Food Center will we refer to another page.

Now, page 11 shows the information that was used by Case & Company to determine the type of service. Let me please indicate a typing correction on that, on page 11. In the first group of stores, the last two names, Wallies and Wilco, there should be an X under the column entitled, Testimony of Store Operator, and also on Wilco's line, reading across towards the right, the X under "Full" is incorrect—it should be under "Limited Service".

On the next line, the first Delocks, the extreme right hand column where it says, Collect for Month, that figure should not be zero, it should be 4. Those are the corrections on the page.

As I said, this page indicates how we determined the type of service and the source from which we determined it. So, for the various A&P stores and complaint customers which are in the first grouping, A&P and Wilco got limited service and the other stores got full service. All of those stores received 27 deliveries per month as indicated by the next column to the right, and all of those stores did not pay cash, * * *

* * * * *

【8952】 Judge Hinkes: Off the record.

(Off the record discussion).

Judge Hinkes: On the record.

By Mr. Falls:

Q. We are now in A&P Exhibit 170, about half way back in the book. The sheet I want to refer to is a sheet entitled

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Information Used By Case & Company to Determine Type of Service and Appropriate Wholesale Delivery Item Standards, Bordens O'Hare Branch, Wholesale Route Customers, March 1966. It is about $\frac{2}{3}$ rds of the way back in the book and comes right after the couple of sheets that set out the Case & Company Delivery Time Standards.

Judge Hinkes: That is Attachment VIII.

Mr. Falls: It looks like this.

Mr. Mathias: I have it now.

By Mr. Falls:

Q. Referring to that exhibit, Mr. Havemeyer, which has to do with the classification of these customers as to the type of service they receive, would you explain, in a little more detail than I think was done on either direct or cross, just how those customers were classified, and on the basis of what information? A. First, the form itself indicates, by X marks in the appropriate column, the source document of information which was used by us in determining the type of service, and then **【8953】** if you move towards the right, under a column entitled, Type of Service Described, you find X marks under the column, Limited, or the column headed Full Service. The left hand columns indicate from whence we got our information and the column I just mentioned, headed Full Service or Limited Service, indicates our conclusion. In the case of the A&P stores, the contract which is shown in CX-62 indicated the form of Limited Service that was to be provided, no special deliveries, essentially a drop type of service, and various other conditions which we classified as Limited Service.

Now, no such single source document was available for the decision as to the type of service rendered to the complaint customers, so we will go down the list, starting with Mayfair Foods.

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Now, there was testimony of a store operator for Mayfair Foods, and as we analyzed that testimony, we found that the merchandise was delivered to the dairy case, right to the dairy case. We found that the Borden driver checked the date of a stock—that meant he had to look at the merchandise that was remaining and find out if the remaining stock there was still within the so-called code date and if it was out of code, he removed the out-dated merchandise and there were even occasions when the drivers would rotate the stock in the dairy case. By that we mean he would bring forward to the front of the case the merchandise which was [8954] still within the code date, but closest to falling outside of the code date—in other words, to try to make certain that merchandise does not become out of date by the next delivery, and Borden took back the outdated merchandise. That was part of their risk or cost of doing business with Mayfair Foods.

We also found that on occasion there were special deliveries made to Mayfair Foods so we have the driver who is handling merchandise, going to the dairy case, rotating the stock, inspecting the stock to see if it is within code. He is replacing the stock. We concluded, on the basis of that, Mayfair Food was receiving full service.

Now, we go to James Cox, and there was also testimony in regard to James Cox, which I think is also known as Jim's Grocery store, and I read the testimony of that gentleman. Now, Cox did not have a back room cooler so the deliveries were made to the dairy case. The driver made out the order, the driver cannot make out the order without at least looking at the stock, what is left. Generally speaking, the driver will build up to a certain inventory point in a case. That is, on a Thursday he knows from experience or discussion with the owner, there ought to be—pick a number—50 half gallons of homogenized milk. In order to know how much to put into the case to make it reach 50, he has to count how much is there, so he has

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to inspect the stock [8955] in the case. The driver puts the milk in the case and rotated the milk in the dairy case so he certainly handled the merchandise. Borden ran the risk of spoilage. If there was out-of-date merchandise, Borden took it back so the driver had to handle that, so the merchandise was delivered to the case, the driver inspected the stock, rotated the stock, took back the out-of-date merchandise, so clearly there was a full type of service for James Cox.

Now, as we come down to the next group of stores, 8 stores, we relied upon the stipulation which had been entered into between counsel, and so we analyzed the stipulations for the next group of 8 stores.

In the case of Cardinal, the stipulation indicates that delivery is made to the cooler and the display case, that the stock is rotated, that the driver had to make out the order and the driver replaced out-of-date merchandise—clearly the type of terms and conditions which qualify under the definition of Full Service.

Now, in the case of Bill's market—

Mr. Mathias: I don't mean to interrupt, Your Honor, but I am wondering if it is necessary to go through and spell out in detail what is in these stipulations and what is in testimony.

Judge Hinkes: I think we can probably dispense with that. I think it is sufficient to say that you examined the [8956] testimony and came to the conclusion it was Full Service based upon his testimony or upon the stipulation. I don't think we have to now recite the details of the testimony or the details of the stipulation. They will speak for themselves.

Mr. Falls: I just want to be clear as to the elements on which the witness did rely in reaching this

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conclusion and there are some little differences from store to store.

Judge Hinkes: There may be but whatever differences there are, are not differences based upon Mr. Havemeyer's observation—they are based upon a witness's testimony, which is in the record, or a stipulation which is in the record, or somebody else's testimony, like Mr. Pergler, which is also in the record, and there is no point in repeating it because, as a matter of fact, if Mr. Havemeyer has a misconception of what that testimony or record consists of, it does no good to have him repeat that misconception.

Mr. Falls: Let me ask a couple more questions.

By Mr. Falls:

Q. Looking at the several customers—there are 8 customers as to whom we relied on stipulation and concluded they received Full Service? A. Yes, I did. I did examine the stipulations.

Q. Did you find any of those customers receiving service sufficiently different from, for example, what you described [8957] with respect to Mayfair or James Cox, to lead you to the conclusion that the service they received should not be characterized or classified as Full Service? A. No. The conditions were such that we came to the same conclusion for that group of 8 as we did for Mayfair and James Cox.

Q. With respect to the remaining customers, at least down through Joe Milecki, do I understand that you classified them as full service based on route book notations saying either pack or check and pack, and Mr. Pergler's testimony with respect to what those notations meant? A. That is true with the exception of Strickland's, no. 256, which I think I should address separately.

Q. All right. Would you address that one. A. Starting with—

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Judge Hinkes: Shouldn't you also speak of Madison LaVeigne and Bell Park?

Mr. Falls: I really addressed my question to only those down through Joe Milecki, but I think you are right—those 2 are in a separate category. Would you address yourself to those stores?

The Witness: Starting with Mayfair Foods, down through Joe Milecki, we found route book notations of "check and pack" or "pack". Mr. Pergler's testimony indicated what that meant, and in reading his definition of what those [8958] notations meant, we concluded that those customers were receiving Full Service. In the case of Strickland, no. 256, there was no notation in the route book for March 1966, but there was a notation in the route book for February 1966. There would be no reason to believe the conditions would change, but rather that the route man had just not posted it in the March book so the book for February 1966 indicates a notation which also led us to conclude, again, based upon Mr. Pergler's description or definition of those notations, that Strickland also received Full Service.

Judge Hinkes: What was that notation?

The Witness: It was either check and pack or pack. That takes us through Joe Milecki.

Now, in the case of Madison LaVeigne and Bell Park Foods, there was no testimony, no stipulation, no route book notation, and Mr. Pergler was asked about those 2 customers and after reading his description of how they were served, it led us to the conclusion those 2 customers were also receiving so-called Full Service.

* * * * *

[9098] Mr. Mathias: Yes, sir.

Judge Hinkes: All of this, I think, is a belated attempt at compliance, and I don't think it would be

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fair to Complaint Counsel to burden him with the necessity of examining documents which come in so late in the proceeding. Coupled with this, if it is true that the matter has already been covered in testimony, I think that further examination, pursuant to this document, which is questionable under the circumstances, would be inappropriate. I shall not permit the discussion of this document. You may explore the issue with your witness, if you care to, but I don't think you would be entitled to discuss this particular exhibit.

Mr. Falls: Let me put a few questions to the witness, along those lines, without reference to the exhibit, Your Honor.

Judge Hinkes: All right.

By Mr. Falls:

Q. Mr. Havemeyer, did you make the study of the discounts actually received by the various O'Hare customers in comparison with the discounts to which they would have apparently been entitled under Borden's published discount schedules? A. Yes, I did.

Q. Did you find that the O'Hare customers, in fact, received the discount which the published discount schedule said they were entitled to receive? **【9099】** A. No. In fact, very few received what the discount schedule would have indicated.

Judge Hinkes: Does that mean they got more or less?

The Witness: They got different.

By Mr. Falls:

Q. Can you generalize as to whether, in general, these customers got more or less than the published discount? A. In general, they got more.

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Q. Do you know, in how many cases all of these customers received less than the published discount?

Mr. Mathias: I would like to note the witness is now going to look at the document which he has just been told not to discuss.

Judge Hinkes: Well, there is a little difference. I think the witness is entitled to look at anything that will help him recall the answer, even if it is a document that is not receivable in evidence.

I would ask you though, Mr. Havemeyer, to first attempt to answer without looking at anything, so that we can be sure that your answer, if it is dependent upon a document, is so noted on the record.

Can you answer without looking at the document?

By Mr. Falls:

Q. Let me make one thing clear—is it a fact the customers you are now speaking of are O'Hare customers listed [9100] on Exhibit 183? A. Yes, they are those customers.

Judge Hinkes: Do you recall the question that was just asked?

The Witness: Were there any customers that received less than what the discount schedule would indicate?

I knew there were a few but I did have to look at it to remember there were only 2.

By Mr. Falls:

Q. Now, with respect to those 2 who received less than the published discount, can you tell us who they were and in what amount a discount they received was less than the published discount? A. I would have to look at the document.

Q. May I ask you to refresh your recollection then by

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looking at the document? A. Edward Marszaick received 0.6 percent less, and Bruno Nalepa received 2.0 percent less than would be indicated by the discount schedule.

Q. What was the maximum amount in excess of the published discount any customer received? A. I believe the maximum amount in excess of the schedule was 12 percent.

Q. Do you know who received that? A. No. I would have to look at the schedule for that.

【9101】 Q. Could you ascertain that by looking at the document? A. Yes, sir.

Bill's Market.

Q. What was the next greatest, after 12 percent? A. 10 percent.

Q. Were there a number of customers who received 10 percent more than the published discount? A. Yes.

Q. Can you identify that? A. I have to look at the document for that.

Q. Would you do so, please. A. Strickland Store No. 256 received 10 percent more than the schedule would indicate. Bill's Market No. 194 received 10 percent more. Gene's Food Shop received 10 percent more.

Q. Is there one other that received almost 10 percent? A. There is one that received 9 point something. Barney Trainor received 9.6 percent more than the schedule.

Judge Hinkes: Then, you have finished your examination of Mr. Havemeyer. Is that correct?

Mr. Falls: Excuse me just a moment.

I think I have completed my examination with 2 possible exceptions, Your Honor. One is there may be some further redirect occasioned by Mr. Mathias's additional examination.

Judge Hinkes: Yes.

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Testimony of Eugene Dischner

April 15, 1974

* * * * *

【7166】 Q. Did you solicit Consolidated Foods? A. Yes, sir.

Q. Would you explain what Consolidated Foods was at that time? A. Consolidated Foods was a grocery warehouse that supplied independent groceries with their supplies of groceries. They had buying programs so that they could purchase other items through the warehouse.

Q. This warehouse was located in the Chicago area? A. Yes.

Q. And the customers they served were located in the Chicago area? A. Yes.

Q. Approximately when did you solicit that business? A. Early in 1968.

Q. With whom did you deal at Consolidated Foods? A. Principally with a gentleman by the name of Dell Johnson.

Q. What was his title or position? A. I do believe his title was Sales Manager.

Q. Did you have more than one meeting with him? A. Yes.

Q. Approximately how many did you have? A. I would say in the course of obtaining the business we must have had seven or eight meetings with him.

Q. These were meetings generally between you and Mr. Johnson? 【7167】 A. And also with the sales manager, Chicago, James Jensen.

Q. Mr. Jensen went with you on these calls? A. Yes, sir.

Q. Did you quote prices to Consolidated Foods? A. We made a proposal, yes.

Q. Was this proposal at Borden's list price less a discount? A. Yes.

Q. What was the discount that you quoted to Consolidated Foods? A. If I can recall, it was approximately 35 percent less, plus two percent to the warehouse.

Testimony of Eugene Dischner

Q. What was the two percent for? A. The two percent was for the warehouse to do the billing and also pay for the milk.

Q. Did the warehouse guarantee the payment? A. They guaranteed the payment of every drop of milk we delivered.

Q. These were not stores owned by Consolidated. A. No, sir.

Q. These were their customers? A. Right. They were all independent groceries.

Q. You secured this business? A. Yes, we did.

Q. How were the deliveries made, to the warehouse? A. No, to the stores.

【7168】 Q. Mr. Dischner, I hand you what has already been received in evidence as RBX 3-A and subsequent pages and ask you whether you have seen that document before the original thereof? A. Yes, I have.

Q. By whom was that prepared? A. Jim Jensen and I.

Q. What does that represent? A. This is a proposal to White Hen Pantry and Markets for their milk business.

Q. Did you take part in the presentation of that proposal? A. Very much so.

Q. With whom at White Hen did you deal? A. Mr. Diana.

Q. What was White Hen as you understood it at that time? A. White Hen was a group of convenience stores located in the Chicago area.

Q. What was Mr. Diana's position? A. I believe he was the General Manager of the White Hen Pantry Markets.

Q. About when did you meet with Mr. Diana? A. I can't recall the exact date—sometime early in the year.

Q. Of 1968? A. Yes.

Q. This was your initial meeting with him? 【7169】 A. Correct.

Q. Who was present at this meeting? A. James Jensen, Mr. Diana and I.

Testimony of Eugene Dischner

Q. Would you please tell us in substance what was said at that meeting. A. Of course, they had what we thought was a very good dairy business. They had said they would like to have a milk proposal broadened. So, in the course of time, in seeing what all he wanted, deliveries and so forth, then Jim Jensen and I put together this further proposal for their milk business.

Q. You presented RBX-3 to him? A. This proposal, correct.

Q. Was it presented on or about the date it bears? A. That is the date it was presented.

Q. Did you subsequently have any conversations with Mr. Diana about whether or not the proposal was acceptable? A. Yes.

Q. Where did that conversation take place? A. In his office.

Q. With reference to the time that you presented the proposal marked RBX-3, about when was this? A. It would be approximately seven to 10 days following the proposal.

Q. At this particular meeting you were present and Mr. Diana, was Mr. Jensen also there? **【7170】** A. Yes.

Q. Was there anyone else there? A. No one else that I recall.

Q. What was said at that meeting? A. That we were not competitive and we did not get the business.

Q. Is that what Mr. Diana said? A. That is correct.

Mr. White: Can we go off the record a moment?

Judge Hinkes: Yes, off the record.

(Discussion off the record.)

Judge Hinkes: On the record.

Testimony of Eugene Dischner

By Mr. White:

Q. Mr. Dischner, I hand you a document which has been marked for identification RBX-22-A through U and ask you to briefly examine it.

(The document referred to was marked Respondent Borden Exhibit 22-A through U for identification.)

Mr. White: Your Honor, would you like an extra copy?

Judge Hinkes: Yes, if you have one, please.

By Mr. White:

Q. Mr. Dischner, could you tell us what RBX-22 for identification is? A. This is a copy of a proposal we made to the National Tea [7171] Stores for their business.

Q. Was this proposal submitted to National Tea on or about the date it bears? A. Yes, sir.

Q. Did you have anything to do with the presentation or submission of this proposal? A. Very much so.

Q. Would you please explain to Judge Hinkes what you had to do with its presentation? A. Between James Jensen and I we put the whole proposal together and went down and submitted it to National Tea.

Q. You have testified that it was submitted on or about the date it bears. A. Yes.

Q. To whom was it submitted? A. Mr. Andrews.

Q. He is the gentleman referred to in RBX-22-B? A. In the cover letter, yes.

Q. Where did the meeting take place? A. At their offices, Division Street, Chicago.

Q. At the address also indicated on the letter? A. Correct.

Q. You present, Mr. Jensen was present and Mr. Andrews? A. Correct.

Testimony of Eugene Dischner

Q. Was anyone else present? **【7172】** A. No one else.

Q. Would you tell us, if anything, was said at that meeting? A. We went through our whole proposal to try to obtain the business.

Q. Before this meeting with Mr. Andrews on about November 21, 1968 had you met with him earlier? A. Yes.

Q. More than once? A. I would say we called on him at least twice before we made the proposal.

Q. In what general period of time would those calls have been? A. Approximately a month prior to the proposal.

Q. When you say we, you mean you and Mr. Jensen called on him. A. That is correct.

Q. Would you tell us what, in general, those one or two visits involved? A. Talking about their overall business, getting a store listing, where all the stores were located, seeing what labels they wanted to use.

Q. Who was serving National Tea at that time with milk products? A. Hawthorn melody.

【7173】 Q. Borden was not serving this account? A. No, sir.

Q. Subsequent to submission of the proposal marked RBX-22, did you have any further conversations with Mr. Andrews? A. Yes.

Q. About when? A. I would venture to say a period seven to 10 days after the proposal was put in we called back on Mr. Andrews to see if we were successful in getting the business.

Q. Again, when you say we, that was you and Mr. Jensen? A. That is correct.

Q. What was said? A. That our prices were not competitive and, therefore, we were not successful in obtaining the business.

Testimony of Eugene Dischner

Mr. White: Your Honor, I offer at this time RBX-22 A through U.

Mr. Stone: No objection.

Judge Hinkes: RBX-22 is received.

(The document referred to, heretofore marked for identification as Respondent Borden Exhibit 22 A through U, was received in evidence.)

By Mr. White:

Q. Mr. Dischner, are you familiar with the wholesale account known as K-Mart Foods? A. Yes, I am.

【7174】 Q. When you came to Chicago in the first part of November 1967 was Borden selling to any K-Mart Food stores? A. We had just started.

Q. What city was that store located in, do you recall? A. No, I don't.

Q. I hand you a document marked for identification as RBX-23-A and 23-B and ask you if that refreshes your recollection as to location of the K-Mart store.

(The document referred to, was marked Respondent Borden Exhibit 23 A and B for identification.)

The Witness: Yes.

By Mr. White:

Q. Where was it located, sir? A. Hammond, Indiana.

Q. Would you please explain to us, if you can, what is the document marked RBX 23 A and B. A. This is a standard pricing page that K-Mart used.

Q. You described the form but what does this particular one represent? A. Pricing that we were selling them milk for in that store in Hammond.

Testimony of Eugene Dischner

Q. Was RBX 23 or the original thereof submitted to K-Mart? A. Yes, sir.

Q. On or about the date it bears? A. Yes.

【7175】 Q. This was done by your staff? A. This was done by Mr. Jensen under my direction.

Q. Before this document was submitted to K-Mart, were you advised as to the circumstances surrounding Borden's pricing to K-Mart? A. Yes.

Q. By whom? A. Jim Jensen.

Q. What did he tell you? A. These were the prices that we had to have to meet competitive conditions in the store.

Q. Did he tell you who the competitor was? A. Yes.

Q. Who was that? A. Beatrice Creamery, Meadowgold.

Q. Meadowgold is their name or style under which they sell? A. That is correct.

Q. Where was the Beatrice Plant located? A. Joliet, Illinois.

Q. During this period we have been discussing namely November 1, 1967 through the end of 1968, was Meadowgold brand milk being sold in the Chicago area? A. Yes, it was.

Q. You mentioned Meadowgold was the competitor. Was K-Mart also buying from Meadowgold? 【7176】 A. Yes.

Q. So the K-Mart store in Hammond, Indiana was selling both Borden and Meadowgold. A. Yes.

Q. Subsequent to 1967 did Borden make sales to K-Mart at the prices shown here? A. Yes, sir.

Q. I direct your attention down the page to a line that starts "Discount and allowances." A. Yes.

Q. What discount, if any, does this indicate that K-Mart was given from these prices? A. Five percent.

Mr. White: Your Honor, we offer RBX-23 A and B.

Mr. Stone: No objection.

Judge Hinkes: RBX 23 is received.

Testimony of Eugene Dischner

(The document referred to, heretofore marked for identification as Respondent Borden Exhibit 23 A and B, was received in evidence.)

By Mr. White:

Q. Mr. Dischner, during the period October 1, 1967 through December 31, 1968, did you ever have any discussions with any representative of A&P regarding the price at which A&P would or intended to sell private label milk products at a store? A. No, sir.

【7177】 Q. During this same period of time, did you have any discussions with any representatives of A&P as to the price at which A&P would sell or intended to sell Borden label products out of store? A. No, sir.

Q. During this same period of time, were there any discussions in your presence between any Borden employees or any A&P employees as to the pricing at which A&P would sell or intended to sell private label products out of store? A. No, sir.

Q. Were there any such discussions in your presence either with Borden representatives or with A&P representative concerning the price which A&P would sell or intended to sell Borden label products out of store? A. No, sir.

Q. During this same period of time, did you have any discussion or conversations of any kind with any representative of A&P regarding the pricing Borden would or might charge other wholesale customers? A. No, sir.

Q. Did any such discussions, whether they be with A&P personnel or solely with Borden personnel take place in your presence? A. No, sir.

Mr. White: Your Honor, that completes our direct 【7178】 examination.

There is one matter, Your Honor. In connection with counts 1 and 2, I understand A&P wishes to

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have Mr. Dischner identify some documents. I don't know the procedure Your Honor wants to follow or how Your Honor wants to handle it, whether we should go ahead and complete the cross-examination now and come back to that since it really is a matter that does not relate to count 3 or whether you would like to have that take place first.

Judge Hinkes: I think we should complete count 3 examination, both direct and cross and then if Mr. Curnin wishes to, he may use the witness on direct examination as his witness for the purpose of identifying any documents that are not involved in the testimony given thus far.

Mr. Curnin, do you have any cross-examination at this time?

Cross-Examination by Mr. Curnin:

Q. You gave us your duties and responsibilities, Mr. Dischner, for the time period 11-67 through December '68 in reference to the Chicago metropolitan division if I understand your testimony correctly.

Did that division during that period of time cover the area of Gary and Hammond, Indiana? A. Yes.

【7179】 Q. You also gave testimony regarding competition that you experienced from your major competitors and you identified them in your testimony this same period of time, it was true, was it not, that Borden had both a published list price and a published discount schedule? A. Yes.

Q. During this period of time, did Borden deviate from and have to sell below the published discount schedule? A. Competitive activities required that we did.

Q. Did competitive activity require such a selling below the published discount schedule on a fairly regular basis during this period of time, November 19, 1967 to December,

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1968? A. When you say fairly regular basis, I would say yes.

Mr. Curnin: No further question, Your Honor.

Mr. Stone: Your Honor, the witness has been on the stand for quite some time and it is somewhat afternoon. I suggest we take our luncheon recess now and perhaps commence with cross-examination after the luncheon.

Mr. White: Your Honor, if it is not inconvenient we would like to finish. This man would like to go back.

Judge Hinkes: Off the record.

(Discussion off the record.)

Judge Hinkes: On the record. We will take a short recess at this time.

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Testimony of William Corbus

April 18, 1974

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[7326] * * *

Q. Did the A&P Tea Company introduce private label products—I am talking now about milk and dairy products—in both New York and Chicago? A. Yes. In 1964 we introduced it in New York and in Chicago in 1965.

Q. Could you tell us what the dollar saving was that was projected in New York at the time of the switch from brand label to private label? A. Yes. It was in excess of \$1 million annually.

Q. Mr. Corbus, during the period 1964 through 1970 did A&P have a procedure that was to be followed by the buyers at the unit or the division level when they sought to either change a milk supplier or sought to change from brand label to private label milk, and if so, would you tell us what that procedure was? A. Yes. The company had a very definite policy. We asked and instructed the Divisional Purchasing Directors to contact responsible, reliable dairies and to obtain from them competitive bids for private label, analyze them, and then finally decide which in their opinion was the best one to submit to headquarters for review by our head milk buyer who at that time was Hershel Smith, and if in Hershel Smith's opinion the arrangement was a satisfactory one he would then discuss it with the Legal Department to eliminate as far as possible any [7327] possible legal complications.

Q. During this period of time then were the actual negotiations between the A&P representative and the potential supplier carried on by people at the unit and division level? A. Yes. At that time they were carried on by the local or divisional buyer.

Q. Has that procedure been changed? A. Yes.

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Mr. Soeffing: I object, Your Honor. I think that goes beyond the scope of the dates involved, 1963 through 1970, and I am somewhat dubious about the relevance of such testimony.

Judge Hinkes: Mr. Curnin.

Mr. Curnin: Your Honor, I think that when the Court hears the testimony, and I realize the ruling has to be made prior thereto, but that this goes very directly and very clearly to the question of relief. We are talking here about procedures which have been in effect concerning the buying of this particular product and how that procedure was implemented at the various levels of unit division in headquarters. That procedure has been changed.

I think that the changes that have been made should be placed on this record and that Your Honor and any reviewing court should be aware of the steps or procedures that have been implemented to insure even greater control over the purchase of this particular product in the A&P Company. It is true that [7328] the change that has occurred is a change that was brought about subsequent to 1970 but it bears directly on this case because it relates to the procedures that are now being followed in connection with the solicitation and the purchase of milk and dairy products from suppliers all across the country.

Judge Hinkes: I will overrule the objection.

You may continue.

Mr. Soeffing: Your Honor, in that regard I am not going to question your ruling and I will abide by it but could we have a time period as to when this did happen?

Mr. Curnin: Yes, Your Honor. I will pursue the change, when it occurred and why it was brought about.

Testimony of William Corbus

By Mr. Curnin:

Q. Mr. Corbus, you have told us that this procedure has been changed. Would you tell us first when the change was implemented? A. The change was implemented in September 1973.

Q. Will you tell us what the change is and what new procedures have been implemented by the Great Atlantic & Pacific Tea Company in connection with its purchase of milk and dairy products throughout the country? A. Your Honor, we decided that it was better to bring the purchasing of milk for the entire company into headquarters for the reason that many of our local or divisional buyers [7329] simply did not have the expertise in the buying of milk that we felt our headquarters buyer would have and that we would have a better control, a firmer control, and more knowledgeable negotiation and for that reason at least it was under my direction to inform the Retail Division that from here on in after September of last year that the purchasing of milk and ice cream and other dairy products be brought into New York for handling under the direction of, it happens to be, Mr. Earl Pilgrim who has spent most of his business lifetime in the dairy industry.

Q. Would it be correct to say then, Mr. Corbus, that the purchasing of milk and dairy products for the tea company throughout the country has now been centralized under the direction and control of the headquarters buyer and that position is now being held by Mr. Earl Pilgrim? A. That is correct. There was one additional advantage due to the fact that the headquarters buyer had ready contact with our Legal Department which of course we did previously but there is an interplay of communication that was not possible under the previous arrangement.

Q. And now the headquarters buyer is familiar with the actual negotiations between himself and the dairy, which information was not personally known to the headquarters

Testimony of William Corbus

buyer under the prior procedure. A. That is correct because the negotiations actually conducted [7330] in New York by our buyer there were directly with the supplier whereas before all the headquarters buyer did was to review what was done locally.

Q. And he would review what was submitted to him by the local unit or division personnel who had themselves conducted the negotiation? A. That is right.

Q. Now, Mr. Corbus, during the period 1964 to 1970 did A&P have a procedure that its unit or division buyers were to follow in soliciting quotes from suppliers, including dairy suppliers? A. Yes, we had a very definite procedure. First, of course, we have to be competitive. We realize that the consuming public was very conscious of the price of milk so that, number one, we did have to be competitive. Number two, we were not a price leader. We would meet competition but based upon our experience we had learned that if we did cut our price of milk that it was immediately met by our competition with the result that there was no particular advantage gained so far as we were concerned. In addition, we instructed our buyers that in their negotiations they were to inform the supplier when submitting his quotations to us that he should include a reasonable profit.

Now I am not prepared to say, nor do I know, what the supplier's costs were or what he would consider a reasonable profit but we felt that it was very important that this [7331] arrangement worked well for both sides. In other words, if it was one sided, it simply would not function and could not last.

Carrying it to a further extreme, if the supplier didn't make a reasonable return, we knew that sooner or later he would either have to discontinue being our supplier or go out of business which in turn would be to the disadvantage of the tea company since we need good, healthy suppliers and as many as possible.

Testimony of William Corbus

Q. Mr. Corbus, the duties and responsibilities of those in A&P responsible for purchasing products and those responsible for the sale of products in its stores, were these duties and responsibilities established throughout the company in its divisions and units as a matter of company policy? A. Yes. These policies were clearly spelled out both verbally as well as in written form.

Q. Under this policy who had the responsibility for establishing the retail price at which any product would be sold out of an A&P store, including milk and dairy products? A. The authority and sole responsibility for that was placed squarely in the hands of the sales manager at divisional level.

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